

Impeachment and Presidential Immunity from Judicial Process

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President Clinton was the first President to be impeached since Andrew Johnson in 1868. The impeachment emerged—nearly out of the blue—from judicial proceedings in which President Clinton was a party. Two constitutional questions running through these events—the scope of impeachment and the exposure of a sitting President to compulsory judicial process—had received extensive scrutiny during the Watergate affair. From that misadventure, which led to President Nixon’s resignation in 1974, survived a body of conventional academic wisdom and specific legal precedent on both questions. On impeachment, the academic consensus at the onset of the recent proceedings was that impeachable offenses are defined in the Constitution as “treason, bribery, or other high crimes and misdemeanors,” the latter terms describing an imprecisely bounded category of serious offenses. The President’s exposure to compulsory judicial process, for its part, had been established definitively in *United States v. Nixon*.¹

The Monica Lewinsky affair, therefore, played out under ground rules shaped in the previous episode involving misconduct by a President. In my view, essential constitutional elements at issue in these events were misconceived by the participants and most academic commentators. The prevailing view of impeachment and presidential immunity slights both the terms of the Constitution and history. The scope of impeachment, based on a straightforward, indeed unequivocal, reading of the constitutional provisions concerning it, is demonstrably different from the academic consensus. And, when impeachment is correctly understood, the question of the President’s immunity from judicial process takes on a different light. It is not a new light, however. Everything that I expound here about impeachment and presidential immunity is derived from the text of the Constitution and history contemporaneous with its drafting. I propose, in other words, to exhume the original meaning of the Constitution on these questions.

Although my immediate purpose is to establish the meaning of sev-

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1. 418 U.S. 683 (1974).

eral constitutional provisions from their language and history, the constitutional scheme of impeachment and presidential immunity that emerges from this exercise is also far preferable to the grotesque muddle through which we suffered of late. Judged either by fidelity to the original understanding embodied in the text of the Constitution or just good sense, the view of impeachment and presidential immunity that I propose here is better than what prevails today.

The impeachment of President Clinton was dismissed by a good number in the academic mainstream as beyond the pale of legitimacy.² Some of this reflected—transparently on occasion—a prevalence of ideological sympathy with the President in academic circles. It was also widely held, even among constitutional and ideological agnostics, that the machinery of impeachment—culminating in possible removal from office—was disproportionate to the President's misconduct.

What has receded from view is that the Lewinsky affair, before slouching through Congress, got its start in the courts. President Clinton gave a deposition in a civil lawsuit orchestrated by political opponents, having failed to win deferral of that suit on grounds of presidential immunity.³ The lawsuit was later dismissed as meritless. In the course of his deposition the President denied a sexual relationship in a setting quite apart from the lawsuit. True or false, the President's denial is unremarkable. This is an area where civilized and otherwise honorable people are not always truthful.⁴ Later, in testimony before a federal grand jury, the President reasserted elements of his deposition statement. The rest I am sure the reader knows. But if not, it is enough to say here that this sorry business, from its beginnings in the courts as a marginal lawsuit, gained momentum enough to carry it to an impeachment trial in the Senate.

Although Americans, and especially legal academic folk, take for granted an imperial judiciary, in most of the world the role of the courts in this affair was unfathomable, even shocking. The exposure of a sitting chief of state to lawsuits, and to compulsory judicial process generally, is unusual outside the United States. In discussions with their European counterparts American lawyers sometimes tried to put a good face on this affair, despite appearances, as demonstrating that in a democracy no

2. See, e.g., Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279 (1998); William Glaberson, *The President's Trial: The Assessment*, N.Y. TIMES, Jan. 23, 1999, at A10 (reporting comments of Professor Ackerman: "The issue is, 'can agents of the House usurp the power of the House to impeach a President and define 'high crimes and misdemeanors'?'"). I chose these examples without afterthought because they are in print and close at hand. A LEXIS search of comments and op-ed pieces by constitutional law professors will overwhelmingly confirm this observation.

3. See *Clinton v. Jones*, 520 U.S. 681 (1997).

4. Divorce proceedings are a common setting for questions about sexual conduct. Those involved are rarely at pains to tell all.

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one, including the chief of state, is above the law.⁵ A good number of those holding out this pabulum, I suspect, knew in their hearts that it is nonsense—that the judicial proceedings involving President Clinton were beyond reason. It was grotesque to have a sitting President tangled up in the courts over what was at worst, or best, an *histoire de couchage*.

The stage was set for these events—and the irony is palpable—in a Supreme Court decision of the Watergate era, *United States v. Nixon*,⁶ holding that a sitting President is subject to compulsory judicial process. *United States v. Nixon* was widely admired in its day—1974—as a path-breaking decision. The question there had not before been directly resolved by a U.S. court.⁷ The detractors of *United States v. Nixon*—and they were few—thought that in the constitutional scheme the President is not subject to a direct judicial command. Impeachment, some argued, was the only way another part of the government could act against a President in office. To this the proponents of *United States v. Nixon*, who were overwhelmingly more numerous, answered that impeachment would often be both insufficient and inapposite. Insufficient, because much misconduct and legal obligation were beyond the reach of impeachment. Inapposite, because impeachment can degenerate into a political circus. Filtered through the courts, by contrast, a case involving the President will receive impartial scrutiny.

These views are wrong in basic respects. To back up this contention, I propose to analyze the constitutional provisions on impeachment and their bearing on presidential immunity. In the process, I shall attempt to get as close as possible to the original meaning of the Constitution on these questions and to demonstrate that this understanding of the Constitution frames a sounder regime for dealing with misconduct by a Presi-

5. In 1998, I overheard a number of such conversations at various conferences in Europe, and even on airplanes to and from such.

6. 418 U.S. 683 (1974).

7. The inference has been drawn—erroneously I believe—from the proceedings involving the Burr conspiracy of 1807 that the President is subject to compulsory judicial process. The events in that case establish no such thing. Justice Marshall issued a request to produce a letter held by President Jefferson. Jefferson, who had already turned the letter over to the Attorney General, asked District Attorney George Hay “voluntarily” to make it available in the proceedings. See David Currie, *The President’s Evidence* 2-3 (1999) (unpublished manuscript, on file with the *Yale Law & Policy Review*).

The *Burr* proceedings literally establish only the willingness of the courts to direct a request for evidence to the President. Even then Justice Marshall was at pains to concede that “[i]n no case of this kind would a court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them.” *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694). Currie infers from the proceedings a concession by Justice Marshall of an important measure of presidential immunity. In any event, the *Burr* proceedings went no further than the issuance of a request by a court. The real test of presidential immunity—the consequences of a refusal by the President to respond to a subpoena—was not reached in the *Burr* case and lay in abeyance until *United States v. Nixon*.

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PRESIDENTIAL IMMUNITY

At the outset, there is no smoking gun in the Constitution on the question of presidential immunity—that is, no provision explicitly shielding the President from compulsory judicial process, or the contrary. The closer we get to the original understanding of the Constitution, however, the more likely it seems that a sitting President is not subject to compulsory judicial process, but only to impeachment.

The Argument from Principle

The President holds the executive power directly under Article II, Section 1, of the Constitution. The exercise of power by other executive officers is derived from the President's. There is little question that other officers—cabinet officials, generals, clerks—are subject to compulsory judicial process.⁸ Because their power is derivative, it can be transferred to others as necessary or desirable. They can be replaced instantly if detained or impeded by arrest, indictment, subpoena, civil action, or inability. If the President, on the other hand, is indicted or compelled to appear at a hearing, the entire executive power may be impaired, or at least constrained in some degree.⁹ If it were possible for another part of the government to act against the President in this way—which would make the United States fundamentally different from any other sovereign nation of the late eighteenth century—one would expect it to be clearly stated in the Constitution. And in point of fact, it is. The President is expressly

8. Also, when the courts act against anyone else in the executive branch, in both criminal and civil cases, they may do so on the basis of the validity of the *President's* actions. The *consequences* of a President's unlawful acts therefore *are* subject to judicial scrutiny, wholly apart from the President's personal exposure to judicial process. The references to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding a court order to have been validly directed to the Secretary of Commerce), that occasionally surface in the debate over presidential immunity, are wholly inapposite. The following from *Clinton*, for example, although offered by the Court as germane, has little or no bearing on the central issue in that case:

[W]hen the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952). Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law.

Clinton, 520 U.S. at 703.

9. On the specific question of *indictment* of a President in office, there is the further technical problem that the President's power of pardon could undo it.

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subject to impeachment by the House of Representatives and trial in the Senate. In England, by contrast, the king was beyond the reach of any official action of any part of government, including impeachment. Extension of impeachment to the President was something new and brought the President more fully within the reach of the law than any European head of state of the time of the drafting of the Constitution.

The silence of the Constitution on the President's exposure to judicial process, in this light, is not neutral, but allows the inference that impeachment is the sole form of official action against a President in office, to the exclusion of judicial process.

This argument is strongly reinforced by further inferences available from the relevant history.

The Early Understanding

It appears from the proceedings of the Constitutional Convention of 1787—to a high degree of certainty in my view—that the framers of the Constitution understood a fundamental relation between presidential immunity and impeachment. For them presidential immunity was the premise of the constitutional provisions on impeachment. There was no hint at the Constitutional Convention that the President would ever be subject to judicial command, and not a few implications to the contrary. Moving to closer range, the President's immunity from judicial command is the apparent premise of the extended debate on impeachment of July 20, 1787. At issue there was the exposure of the President to impeachment and, by inference, to other official actions of government. From the debate it is plain, I believe, that impeachment was understood on all sides as the *only* way to reach misconduct by the President. Several proponents of the impeachment power argued that, without it, the President would be above the law. George Mason urged: "No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? . . . When great crimes were committed he was for punishing the principal as well as the Coadjutors."¹⁰ Elbridge Gerry "urged the necessity of impeachments," and "hoped the maxim would never be adopted here that the chief Magistrate could do <no> wrong."¹¹ For Edmund Randolph "[t]he propriety of impeachments was a favorite principle Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections."¹² Randolph was echoing a

10. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (rev. ed. 1937).

11. *Id.* at 66.

12. *Id.* at 67.

similar point of Benjamin Franklin's:

What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character. It [would] be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.¹³

Gouverneur Morris, who opposed a broad impeachment power, had previously argued that there was no need for presidential impeachment because "[the President] can do no criminal act without Coadjutors who may be punished."¹⁴ Morris's remark, as does Mason's responding to it,¹⁵ assumes that the President himself is beyond the reach of the courts. Otherwise, both the President and his "coadjutors" could be punished. Indeed, the entire discussion of July 20 is meaningless if the President is otherwise subject to judicial power.¹⁶

The immediate premise of the debate of July 20, 1787, to be sure, is the immunity from *criminal* sanction of a President, in default of an impeachment power. Impeachment is urged as necessary to make a President answerable for "crimes" and "criminal acts." The President's exposure to *civil* action in the courts does not surface as explicitly. That, in my view, is because the idea does not cross the threshold of plausibility: it would not have occurred to the framers that a sovereign immune from criminal prosecution might be subject to routine civil liability. To the framers I would think it nearly self-evident that the greater immunity implied the lesser. To test this view I invite the reader to scour the debate of July 20 with the following question in mind: could the framers have contemplated that a sitting President so far "above justice"¹⁷ in the courts that he cannot be indicted for murder could nonetheless be sued in tort?

A generation later Joseph Story wrote in his Commentaries that the President must be allowed to exercise the "incidental powers . . . belonging to the executive . . . without any obstruction or impediment whatsoever," and that the "President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at

13. *Id.* at 65.

14. *Id.* at 64.

15. *See supra* p. 57.

16. At this stage of the deliberations, furthermore, the trier of impeachments was not settled and could still have been the Supreme Court, upon an accusation brought by the House of Representatives. This makes it even less plausible that the President could be subject to judicial power in any other way. There would be little reason to contemplate special jurisdiction of the Supreme Court over the President in impeachments if the President were routinely subject to judicial power.

17. These are Mason's words. *See supra* note 10 and accompanying text.

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least, to possess an official inviolability.”¹⁸ The fair import of this comment, I believe, is that the President personally is beyond the reach of the courts and, in civil cases, beyond the reach of any official action, including impeachment. In other words, the only possible official action against a sitting President’s person is impeachment for crimes. Echoing and extending Story’s comment, an 1838 Supreme Court decision, *Kendall v. United States*, states as though a self-evident and eternal verity that

the executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.¹⁹

In both Story’s Commentaries and *Kendall* appears a common understanding that the President is not subject to compulsory judicial process. In *Kendall*, furthermore, the President’s immunity from judicial process is expressly understood as a corollary of his exposure to impeachment. Together the import of these excerpts is stronger than either separately. In the *Kendall* dictum standing alone the words “as far as his powers are derived from the constitution” could be construed as limiting its focus to presidential immunity for official acts.²⁰ Story’s comment, however, extends inviolability to the President’s person in civil cases. Indeed, in light of Story’s comment, the apposed words in *Kendall* can as readily be understood to mean “as possessor of the executive power under the Constitution” and refer to presidential immunity as broadly as Story does.²¹ Either way, the thrust of both comments cuts only in the direction of presidential immunity.

In *Clinton v. Jones* the majority disposes of Story’s comment with an explanation to which, because I cannot do it justice by paraphrase, I must allow its own voice: “Story said only that ‘an official inviolability’ . . . was necessary to preserve the President’s ability to perform the functions of the office; he did not specify the dimensions of the necessary immunity. While we have held that an immunity from suits grounded on official acts is necessary to serve this purpose, see *Fitzgerald*, 457 U.S. at 749, it does not follow that the broad immunity from all civil damages suits that petitioner seeks is also necessary.”²² By this reasoning the Court transforms Story’s assertion of an “inviolability” (a notion with a strong flavor of the

18. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (Boston, Hillard, Gray, and Co. 1833).

19. 37 U.S. (12 Pet.) 524, 610 (1838).

20. Even so construed, the *Kendall* dictum does not, of course, deny presidential immunity from judicial process for private acts. It is merely silent on the question.

21. Justice Story was on the Supreme Court at the time of *Kendall v. United States* and participated in the decision. See *Kendall*, 37 U.S. (12 Pet.) at v.

22. *Clinton*, 520 U.S. at 695 (citation omitted) (citing *Fitzgerald*, 457 U.S. at 749).

absolute or all-encompassing²³) that is “official” (meaning, one might presume, “derived from the office”) into a yardstick with an unexplained shifting unit of measure along the relevant “dimensions.” As for *Kendall*, the majority in *Clinton v. Jones* handles it more neatly, with utter silence.

At some point, evidently, between these beginnings and *Clinton v. Jones*, the early understanding of presidential immunity lost its mooring, having given way to the notion that a President subject only to impeachment would be in some manner above the law. The precise extent of the President’s exposure to judicial process today is far from clear. Joseph Story’s view that a President in office cannot be indicted, arrested, or imprisoned apparently still holds.²⁴ If nothing else, the mechanics of indictment and trial of a holder of the pardoning power portend labyrinthian difficulties. But *United States v. Nixon* clearly holds the President subject personally to compulsory process in criminal proceedings involving others, while *Clinton v. Jones* holds him subject to private civil lawsuits, and the attendant compulsory process, for nonofficial acts. *Clinton v. Jones* also brought its own new formulation of the respective spheres of impeachment and judicial action concerning misconduct, obligations, and liabilities of the President. To the Supreme Court’s generalized pronouncement in *United States v. Nixon* (“We therefore reaffirm that it is the province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege presented in this case.”²⁵) *Clinton v. Jones* adds the more fully articulated proposition that:

[w]ith respect to acts taken in his “public character”—that is official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages[.] [b]ut he is otherwise subject to the laws for his purely private acts.²⁶

23. In *The Federalist* Hamilton describes the King of Great Britain as “inviolable,” meaning that “there is no constitutional tribunal to which he is amenable.” THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961). I therefore doubt that Story meant “inviolability” in “civil cases” to mean “except in private tort actions.”

24. Special prosecutor Kenneth Starr sent his report on the grand jury to Congress, for possible impeachment, and did not proceed in court. The Independent Counsel Statute instructs the special prosecutor to report possible impeachable offenses to Congress, but does not expressly bar proceedings directly against the President. See 28 U.S.C. § 595(c) (1994) (“An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel’s responsibilities under this chapter, that may constitute grounds for an impeachment.”).

Later, toward the end of the impeachment proceedings, there were leaks from the special prosecutor’s office suggesting that Starr did in fact consider a sitting President subject to indictment. See Don Van Natta, Jr., *The President’s Trial: The Independent Counsel Starr Is Weighing Whether To Indict Sitting President*, N.Y. TIMES, Jan. 31, 1999, at A1. For further discussion, see *infra* pp. 92-93.

25. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

26. *Clinton*, 520 U.S. at 696. Note the sponginess of the Court’s language in this crucial statement. That the President may be disciplined “principally” by impeachment for official acts implies some residual or “minor” exposure to judicial process for those same acts. Is that what

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Closer scrutiny of the Court's encapsulation in *Clinton v. Jones* brings out the full incoherence of present law. On its face, the Court's statement does *not* exclude—indeed invites—possible arrest or indictment of a President for such “purely private acts” as crimes directed at private persons.²⁷ That is, inescapably, what it means to be “subject to the laws” for “purely private acts.” Murder of a private person or shoplifting is not an official act, and being “subject to the laws” (unless the Court is following the semantic practice of H. Dumpty²⁸) means possible arrest, indictment, and trial.²⁹ If, on the other hand, the Court did not mean what it manifestly said—and it still holds true that the President is not subject to arrest, indictment, or imprisonment—then a President can be sued in tort but not arrested or indicted for murder. And while you are asking yourself how weird is that, consider as well, in such a patchwork regime of presidential immunity, how exactly a President can be subject to civil suit? Suppose the President just says no and ignores the suit. Jail for contempt, by hypothesis, is out of the question.³⁰ Therefore impeachment becomes the backstop of civil suits against the President.

The view of presidential immunity implicit in *Clinton v. Jones*, when pressed, thus defies reason as well as the available inferences from history.

For many, of course, fidelity to historical meaning is not the sole, or even major concern. Most do, however, want a constitutional scheme that makes good day-to-day sense. In that regard, the urgency of leaving a President exposed to compulsory judicial process depends importantly on the scope of impeachment, as even the Supreme Court appears to understand in *Clinton v. Jones*. If in impeachment we find an instrument sufficient to protect the public at all events against misconduct by the President, then *United States v. Nixon* and *Clinton v. Jones* lose considerable force. An essential step, therefore, in thinking through the question of

the Court means, or is it just too unsure of itself to do without waffly modifiers?

27. There is a similar implication in the Court's pronouncement that “[i]f the Judiciary may . . . direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct.” *Id.* at 705.

28. See LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 186 (Signet ed. 1960) (“‘When I use a word,’ Humpty Dumpty said . . . ‘it means just what I choose it to mean—neither more nor less.’”).

29. In January 1999, the *New York Times* reported that Kenneth Starr had concluded, on the strength of *Clinton v. Jones*, that a prosecutor could seek the indictment, trial, and conviction of a sitting President. See Van Natta, *supra* note 24, at A1. Any such inference drawn by Starr from *Clinton v. Jones* was entirely justified, even if beyond the contemplation of the Supreme Court itself.

30. I need hardly add that the premise is unreal. Some sort of physical power is necessary to support any compulsion exercised by a court. Therefore any exposure of the President to compulsory judicial process ultimately implies significant exposure to detention and indictment. Conversely, to concede the President's immunity from indictment and detention ultimately brings into doubt any judicial action.

presidential immunity is to bring the scope of impeachment into the sharpest possible focus.

THE SCOPE OF IMPEACHMENT

On this score I have good news. A close reading of the constitutional provisions on impeachment brings a remarkably clear—indeed nearly unequivocal—understanding of the scope of impeachment. And to find it, one need only look closely at the words of the Constitution.

The reader, quite possibly, will react skeptically to this claim. Commentators on impeachment have found great uncertainty in the constitutional provisions and relevant history, and differ widely among themselves.³¹ If there were a clear meaning to be found, wouldn't they know about it? Surely, you may think, scholars have pored over the constitutional provisions on impeachment, especially scholars commenting on the late proceedings involving President Clinton. How else would one find out the scope of impeachment? Think again. American lawyers, including constitutional scholars, take a somewhat Olympian approach to the Constitution, preferring broad-brush overview to hard grappling with the nuts and bolts. Some find that the actual text distracts them from their main concerns.³²

If asked at almost any time in the past fifty years³³ about the constitutional provisions on impeachment, an American constitutional scholar (not just any lawyer) would have answered something like: "Well, the constitution defines impeachable offenses as treason, bribery, and high crimes and misdemeanors."³⁴ This understanding of impeachment is so

31. The view has also surfaced that the impeachment provisions, reflecting the political nature of the process, cannot be clearly apprehended. See Michael Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 5 (1989) ("[T]he impeachment clauses virtually defy systematic analysis precisely because impeachment is by nature, structure, and design an essentially political process." (footnote omitted)).

32. When I outlined the analysis of impeachment presented here to an eminent constitutional scholar, the response was, "You're just talking to me about words. I don't care about that."

33. The only exception might have been a few weeks in early 1999 when the theory of impeachment expounded here received brief public attention.

34. I can't help noticing that in an article on impeachment my colleague Cass Sunstein, after allowing that "[t]he text of the Constitution is the place to begin," goes on: "It says that a President may be removed for 'Treason, Bribery, or other high Crimes and Misdemeanors.'" Sunstein, *supra* note 2, at 282 (citation omitted). Actually, it doesn't exactly say that: it says that the President *shall be removed* upon impeachment and conviction of those offenses. Therein lies much of the story, elided in Sunstein's article before it begins. There is another, somewhat comical, instance of detachment from the text in Vikram Amar's review of Ann Coulter's book on the Clinton impeachment. Scolding Coulter for lack of focus on the precise terms of the Constitution, Amar writes: "Remarkably, Ms. Coulter never carefully parses the provision in the Constitution that is most closely on point—Article II's statement that the President (and other civil officers) can be impeached, convicted and removed for 'bribery, treason and other high crimes and misdemeanors.' Ms. Coulter simply never analyzes, as a good lawyer must, what the text says."

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widespread that the words “high crimes and misdemeanors” have come to be synonymous in common discourse with “impeachable offenses.”³⁵ A similar understanding can be found in most of the recent scholarly writing on the subject.³⁶

Now let us see what the Constitution actually says about impeachment. This will come as a surprise to many readers, including some whose profession is thinking about the Constitution. A close reading of the Constitution, coupled with some exploration of relevant history, reveals that 1) impeachable offenses are not defined in the Constitution, 2) “high crimes and misdemeanors” are an historically well-defined category of offenses aimed specifically against the state, for which removal from office is mandatory upon conviction by the Senate, 3) Congress has the power to impeach and remove civil officers for a range of offenses other than high crimes and misdemeanors, and 4) the Senate can impose sanctions less severe than removal from office—censure, for example—on civil officers convicted of such other offenses.

These points are expounded fully in the following pages. To afford the reader some landmarks, let me start with an outline of impeachment in broad overview. Federal impeachment is a criminal process of accusation and trial carried out in Congress. Like all criminal process impeachment has the ultimate goal of protecting the public from wrongdoing. Its object historically has been holders of important public office. While not defined in the Constitution, impeachable offenses are framed by the history of impeachment itself, and inherently involve serious misconduct.

Article II, Section 4

The most widely cited provision on impeachment in the Constitution is Article II, Section 4, which reads:

The President, Vice President, and all civil officers of the United States shall

Vikram David Amar, *The Truth, the Whole Truth, and Nothing but the Truth About “High Crimes and Misdemeanors” and the Constitution’s Impeachment Process*, 16 CONST. COMMENTARY 403, 407 (1999) (book review). If you do not see the humor here, take a close look at Article II, Section 4, which conveniently is analyzed in the rest of this article.

35. See, e.g., Bruce Ackerman, *What Ken Starr Neglected to Tell Us*, N.Y. TIMES, Sept. 14, 1998, at A33 (asserting “high crimes and misdemeanors” as the constitutional “test” of impeachment).

36. See, e.g., RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); IRVING BRANT, *IMPEACHMENT* (1972); ANN H. COULTER, *HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON* (1998); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* (1996).

Since the conclusion of the trial of President Clinton, at least one article has appeared expressing doubts about the conventional understanding of impeachment. See Mark R. Slusar, *The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment*, 49 CASE W. RES. L. REV. 869 (1999). Slusar analyzes many of the doctrinal contentions that arose during the proceedings, with sound critical judgment in my view.

be removed from Office on Impeachment for and conviction of Treason, Bribery, or other High Crimes and Misdemeanors.³⁷

These words do not define impeachable offenses. They are not literally a definition at all. Rather, they *require* that a President and others, if convicted upon impeachment of various serious offenses, be removed from office. "Shall be removed" is a command, not a definition.³⁸ Placed at the end of Article II, this clause says peremptorily that if the President and other civil officers are convicted of certain bad acts, Congress must throw them out. Article II, Section 4, in short, asserts a mandatory penalty of removal for certain crimes of civil officers.

Although it enumerates several impeachable offenses, nothing in Article II, Section 4 indicates that it is an *exhaustive* listing. That civil officers *must* be removed for "treason, bribery, or other high crimes and misdemeanors," does not preclude the existence of other misconduct for which they *may* be impeached and removed. For Article II, Section 4, to be an exhaustive listing, "shall be removed for" must be taken as somehow equivalent to "shall be removed *only* for." When the drafters of the Constitution wanted to give a restrictive definition, however, they knew how to do so unambiguously, as in their definition of treason in Article III, Section 3.³⁹ One has to work *against* the text to find in Article II, Section 4, a definition of all impeachable offenses rather than a specification of those offenses for which removal from office is mandatory upon conviction.

This reading of Article II, Section 4, is systematically confirmed in other provisions on impeachment in the Constitution. The impeachment power is granted to Congress in Article I:

The House of Representatives . . . shall have the sole Power of Impeachment⁴⁰ The Senate shall have the sole Power to try all Impeachments.⁴¹

The term "Impeachment" appears in these provisions without explanation, as though well-understood. Terms so used in the Constitution were taken in 1787 (and sometimes even today) in their established sense.⁴²

37. U.S. CONST., art. II, § 4.

38. "Shall" has imperative force everywhere in the Constitution when it occurs in an independent clause. Every command in the Constitution is couched in terms of "shall." See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-33 (1816). There were exchanges at the Federal Convention confirming that the framers attached imperative force to "shall." See 2 FARRAND *supra* note 10, at 377, 412-13.

39. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST., art. III, § 3.

40. U.S. CONST., art. I, § 2, cl. 5.

41. U.S. CONST., art. I, § 3, cl. 6.

42. In 1807, Chief Justice Marshall wrote of another such phrase, "levying war": "It is scarcely conceivable that the term was not employed by the framers of Our constitution in the sense which had been affixed to it by those from whom we borrowed it." *United States v. Burr*,

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Impeachable offenses both in England and America had included a broad range of misconduct other than “high crimes and misdemeanors.”⁴³ Thus if Article II, Section 4, is to be taken, against its words, as an exhaustive listing of impeachable offenses, it also represents a sharp break with earlier practice. Had the framers intended such a break, they could have accomplished it more clearly than by commanding removal for high crimes and misdemeanors in Article II after providing a general grant of the power to impeach in Article I.

Beyond these generalities, there is more specific confirmation of this reading of Article II, Section 4, in Article I, Section 3:

Judgment in Cases of Impeachment *shall not extend further than* to removal from Office and disqualification to hold or enjoy an Office of honor, Trust, or Profit under the United States (emphasis added).⁴⁴

The limitation on the severity of judgments bears on the scope of the impeachment power in several ways. First, it confirms the drafters’ ability to be explicit when departing from English precedents. Article I, Section 3, prohibits the more severe penalties allowed in England.⁴⁵ Had the framers also wanted to provide for a narrower range of impeachable offenses, they could have put a similar limitation in the Article in which they granted to Congress the powers of impeachment.

Second, the words “judgment . . . shall not extend *further* than to . . .” do allow judgments to extend *less* far than removal and disqualification. Lesser judgments than removal were possible in English impeachments. Among the penalties in impeachments acknowledged by Blackstone, along with severe punishments such as banishment, imprisonment, and fines, are forfeiture of office, perpetual disability, and “discretionary censure, regulated by the nature and aggravations of the offence committed.”⁴⁶ It can hardly have been beyond the framers’ powers, had they wanted to foreclose any other possibility, to write that the *only* judgments in cases of impeachment shall be removal and disqualification. At least one eighteenth-century lawyer was able to express that idea unambiguously. Thomas Jefferson’s 1783 draft of a proposed constitution for Vir-

25 F. Cas. 55, 159 (No. 14,690) (C.C.D. Va. 1807). See also *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) (interpreting “impeachment” with reference to its common law meaning).

43. See *infra* pp. 71-75.

44. U.S. CONST., art. I, § 3.

45. As the framers were well aware, see BERGER, *supra* note 36, at 4 n.21, 30 n.107, 87 n.160, 122 n.4, 143 n.97, the English House of Lords had handed down a wide variety of judgments in impeachment cases. Compare, for example, Case of Henry Sacheverell, 15 State Trials 1, 39, 474 (Howell 1710) (temporary suspension from preaching), and Case of Theophilus Field, 2 State Trials 1087, 1118 (Howell 1620) (censure), with Case of Lord Lovat, 18 State Trials 529, 838 (Howell 1746) (hanging, drawing and quartering).

46. 4 WILLIAM BLACKSTONE, COMMENTARIES *121. See *id.* at *141. For further discussion of the hierarchy of penalties in impeachment see *infra* pp. 86-88.

ginia contains the following: “[A]nd the *only* sentence they shall have authority to pass shall be that of deprivation and future incapacity of office.”⁴⁷

Third, and most importantly, Article I, Section 3, undercuts any reading of Article II, Section 4, as a comprehensive statement of impeachable offenses. With removal and disqualification the outer limits of a range of judgments, Article II, Section 4—which commands only one of the extreme judgments permitted in Article I, Section 3—would be badly drafted as the vehicle for defining the entire range of impeachable offenses. It follows that Article II, Section 4, is no such thing. Rather, Article II, Section 4, lists a category of crimes for which no lesser judgment than removal is possible.

A further textual clue lies in Article II, Section 4, itself. If that provision is an exhaustive statement of the impeachment power, defining both impeachable offenses and impeachable persons, then *military* officers cannot be impeached at all, even for treason.⁴⁸ The omission of military officers from Article II, Section 4, not readily fathomable at first sight, becomes more sensible when the clause is correctly understood as requiring removal in some cases and nothing more. The Senate *may* remove a military officer convicted of bribery, for example, but need not, and may do nothing more than reprimand or deny a promotion. A possible reason for restraint in a given case might lie in a particular balance of public protection and military exigency.⁴⁹

There is yet more confirmation of this reading of Article II, Section 4, in the provision of Article III for the tenure of judges, which is discussed below.⁵⁰

Once Article II, Section 4, is understood, not as defining the impeachment power or impeachable offenses, but as requiring removal in certain cases, two further questions arise. First, why does the Constitution specifically require removal from office upon conviction of “treason, bribery, or other high crimes and misdemeanors”? Second, if not limited

47. 1 THE JEFFERSONIAN CYCLOPEDIA 416 (John P. Foley ed., 1967) (emphasis added).

48. Article II, Section 4, please note, deals with the removal of civil officers only.

49. Robert Harper, a Manager in the first federal impeachment trial (of former Senator William Blount in 1799) made this very point:

[The object of Article II, Section 4] is, not to designate the persons who shall be liable to impeachment, but to prevent the Senate, in the exercise of their discretion, from retaining in a civil office, a person convicted of “treason, bribery, or other high crimes and misdemeanors.” . . . [T]he distinction . . . between *civil* officers, and other officers . . . may, however, be supposed to have arisen from an opinion, certainly well founded, that, under certain circumstances, there might be danger, or great inconvenience, in removing from his command, a *military* officer, whom, nevertheless, it might be very proper to censure or suspend, or even to disqualify for some particular offices.

8 ANNALS OF CONG. 2302 (1799).

50. See *infra* pp. 75-79.

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to this enumerated type, what are impeachable offenses? Here too, the answer to both questions is surprisingly clear in light of the relevant history.

“High Crimes and Misdemeanors”

The core of the conventional view of impeachment—derived from an erroneous reading of Article II, Section 4, in my view—is that “treason, bribery, or other high crimes and misdemeanors” make up the constitutional standard of impeachable offenses. The conventional understanding, however, offers no clear notion of what “high crimes and misdemeanors” are. Commentators on impeachment differ widely among themselves over what constitutes a “high crime or misdemeanor.” Having little focus on the historical meaning of these words, writers tend to choose a meaning consistent with their preferences concerning proceedings in view at the time of their writing.⁵¹ Much writing on impeachment consistently overlooks straightforward historical indications of the scope of “high crimes and misdemeanors” and impeachable offenses generally.⁵²

A little digging into legal authorities well-known in 1787 reveals what “high crimes and misdemeanors” are and why they are specifically stated grounds of mandatory removal in Article II, Section 4. The reason lies in the meaning of the word “high.” Without the word “high” attached to it, the expression “crimes and misdemeanors” is nothing more than a description of public wrongs, offenses that are cognizable in some court of criminal jurisdiction. Blackstone, speaking of the criminal law, begins: “We are now arrived at the fourth and last branch of these commentaries; which treats of *public wrongs or crimes and misdemeanors* . . .” and later continues: “A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it.”⁵³

In the eighteenth century the word “high,” when attached to the word

51. Berger concludes that “high crimes and misdemeanors,” and therefore impeachable offenses, amount to serious misconduct, but are not limited to crimes. See BERGER, *supra* note 36, at 53-102 (especially 91-93). Brant concludes that “high crimes and misdemeanors” consist only of crimes indictable under federal law and violations of oaths of office. See BRANT, *supra* note 36, at 23. During the Watergate affair the staff of the House Judiciary Committee took a position close to that of Berger. See Impeachment Inquiry Staff of House Comm. on the Judiciary, 93d Cong., 2d Sess., *Constitutional Grounds for Presidential Impeachment* 1, 4 (Comm. Print 1974). President Nixon’s lawyers took a position very near that of Brant. See James D. St. Clair, *An Analysis of the Constitutional Standard for Impeachment*, in PRESIDENTIAL IMPEACHMENT: A DOCUMENTARY OVERVIEW 40-73 (Morris B. Schnapper ed., 1974).

These views resurfaced in the Clinton impeachment, reshuffled in light of different forensic perspectives.

52. But see Arthur Bestor, *Impeachment: The Constitutional Problems*, 49 WASH. L. REV. 255 (1973) (reviewing Berger).

53. 4 BLACKSTONE, *supra* note 46, at *1, *5.

"crime" or "misdemeanor," describes a crime aiming at the state or the sovereign rather than a private person. A "high crime or misdemeanor" is not simply a serious crime, but one aimed at the high powers of the state. "High" has denoted crimes against the state since the Middle Ages.⁵⁴

This meaning of "high" was known to the lawyers of 1787. Part III of Coke's *Institutes*—standard fare for lawyers of the eighteenth century⁵⁵—begins with a chapter on *high* treason, followed by a chapter on *petit* treason, the first sentence of which demonstrates that for Coke "high" meant "against the sovereign": "It was called high or grand treason in respect of the royall majesty against whom it is committed, and comparatively it is called petit treason . . . in respect it is committed against subjects and inferior persons . . ."⁵⁶ Blackstone reasserts this meaning of "high,"⁵⁷ describing various "misprisions" and "contempts . . . immediately *against the king and government*" as "all such *high* offences as are under the degree of capital."⁵⁸ Blackstone's enumeration of "high misdemeanors" under this heading includes "maladministration," embezzlement of public money, various misprisions "against the king and government," and violence or threats of violence against a judge.⁵⁹ Blackstone also lists endeavoring "to dissuade a witness against giving evidence."⁶⁰ Blackstone's taxonomy establishes both the nature of "high" offenses and the difference between them and serious (i.e. "capital") crimes generally.⁶¹ I do not

54. The first appearance of the word "high" with this meaning in impeachments may have been in the proceedings against Robert de Vere and Michael de la Pole in 1386: "[I]t was declared that *in so high a crime* as is alleged in this appeal, which *touches the person of the king, our Lord, and the state of his entire realm . . .*" 3 Rotuli Parliamentorum [Rolls of Parliament] 236 (undated) (emphasis added) (passage from the rolls of Parliament for the years 1387-88, translated by the author from the original French: "[estoit declare], Que en si haute crime come est pretendu en cest Appell, q [qui] touche la persone du Roi nre [nostre] dit Sr [Seigneur], & l'estat de tout son Roialme . . .").

55. See, e.g., 10 THE WRITINGS OF THOMAS JEFFERSON 376 (Paul Leicester Ford ed. New York, The Knickerbocker Press 1899); William Koch, *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 348, 361, 363 (1997); Robert Riggs, *Substantive Due Process in 1991*, 1990 WIS. L. REV. 941, 958, 992-95 (1990).

56. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN 19-20 (London, W. Clarke & Sons 1817).

57. Blackstone continues Coke's classification of treason as "high" and "petit." See 4 BLACKSTONE, *supra* note 46, at *75. Like Coke, Blackstone was widely known in colonial America. See, e.g., 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 501 (1836) (remark by James Madison regarding Blackstone); Riggs, *supra* note 55, at 992-95 (1990).

58. 4 BLACKSTONE, *supra* note 46, at *119 (emphasis added).

59. *Id.* at *121-26.

60. *Id.* at *126. In case you were wondering, this appears to consist of trying to keep a witness from appearing at all rather than suggesting false testimony.

61. There is also a difference between "high" crimes and crimes "against the King's peace," the latter words being a routine recital bringing a class of serious offenses within the jurisdiction of the King's courts. See, 1 BLACKSTONE, *supra* note 46, at *118, *268, *350; 4 *id.* at *444

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mean to suggest, I should add, that “high crimes and misdemeanors” in Article II, Section 4, are to be taken as congruent with offenses identified as “high” by Blackstone, but simply that the import of the term “high” attached to crimes is clear in Blackstone’s *Commentaries*.⁶²

The form of the phrase “treason, bribery, *or other high crimes and misdemeanors*” in Article II, Section 4, indicates that “treason” and “bribery” are also “high” crimes. The definition of treason in the Constitution⁶³ is taken verbatim from Blackstone’s definition of “high” treason.⁶⁴ Thus the first enumerated crime in Article II, Section 4, is unequivocally a “high” crime. Bribery of a public official was also a crime against the state at common law, being limited to the making or taking of payments to influence the course of justice.⁶⁵

“High crimes and misdemeanors” thus refer to crimes that harm the state in an immediate way and impair its functioning. Examples of high crimes include treason, bribery, espionage, obstruction of justice in federal criminal proceedings, sabotage of government property, and embezzling or stealing from the public treasury.

The proceedings of the 1787 Constitutional Convention strongly imply this understanding of “high crimes and misdemeanors” among the framers. The version of Article II, Section 4, originally reported to the Convention from the Committee of Eleven listed as offenses only treason and bribery.⁶⁶ The Convention added the terms “high crimes and misdemeanors *against the State*.”⁶⁷ The words “against the State” were subsequently deleted from this clause, being first replaced by “against the United States” in order “to remove ambiguity.”⁶⁸ The words “against the United States” were then removed without explanation by the Commit-

(appendix).

62. Blackstone describes one other “high misdemeanor,” to wit, knowingly receiving stolen goods, under the heading “Offenses Against Public Justice.” See 4 *id.* at *132. This is not an immediately obvious crime against the state. Blackstone’s discussion is a little cryptic, but the classification appears to be a fiction designed to overcome the difficulties of prosecuting receivers of stolen goods at common law without concurrent or prior conviction of the thief. The receiver who knew goods were stolen was therefore deemed to be interfering with justice, and could be prosecuted on this ground independently of the thief. Even though strained, this use of “high” implies action against the course of government. It is, if you will, the fiction that confirms the rule. Again, I do not offer Blackstone as a talisman, but as confirming the basic notion of a “high” crime at common law.

63. U.S. CONST. art. III, § 3. (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”).

64. See 4 BLACKSTONE, *supra* note 46, at *81-82.

65. *Id.* at *139.

66. See 2 FARRAND, *supra* note 10, at 550.

67. *Id.* (emphasis added).

68. *Id.* at 551. The “state” in question in federal impeachments is of course the United States.

tee of Style.⁶⁹ The Committee of Style, unlike other committees of the Convention, was not authorized to make any changes in meaning.⁷⁰ This allows the strong inference that the drafters considered the words “against the United States” redundant in this clause. Further underscoring this understanding, Representative Lawrence of New York, speaking in the First Congress, referred to Article II, Section 4, of the Constitution as preventing the retention in office of persons “guilty of crimes or misdemeanors against the Government.”⁷¹

There is other evidence from the Constitutional Convention that the framers did not consider “high misdemeanors” to be a grab-bag of unspecified offenses, but crimes directed at the state. When a draft provision for extradition by the states of “any person charged with treason, felony or high misdemeanor” was considered, the words “high misdemeanor” were replaced with “other crime,” (as Article IV, Section 2, now reads) because it was “doubtful whether ‘high misdemeanor’ had not a technical meaning too limited.”⁷² In the debate of August 20 on treason, which is held out as “an offence against the Sovereignty”⁷³ there is a particularly telling observation of Rufus King, who points out that the definition of treason “excludes any treason against particular States,”⁷⁴ adding that “[t]hese may however punish offences” against them “as high misdemeanors.”⁷⁵

This meaning of “high” explains why Article II, Section 4, requires removal for “high crimes and misdemeanors.” It bars the retention in office of civil officers convicted of wrongdoing that harms the state itself. Because it does not concern itself with wrongdoing that strikes elsewhere, however, Article II, Section 4, is not plausible as a comprehensive definition of impeachable offenses.⁷⁶ Any number of the most serious crimes—murder, bank robbery, rape—are not “high” crimes.⁷⁷ Article II, Section

69. *See id.* at 575, 600.

70. *See id.* at 553.

71. 1 ANNALS OF CONG. 392-93 (Joseph Gales ed., 1789).

72. 2 FARRAND, *supra* note 10, at 443.

73. *Id.* at 346 (remark of Johnson).

74. *Id.* at 348. This is so because the definition of treason in the Constitution is limited to treason against the United States.

75. *Id.*

76. Even if it were conceivable to leave a President who had committed other crimes (such as murder) beyond the reach of impeachment—on the ground, for example, that only harm to the state warrants removal—it is unimaginable to do the same for federal judges. *See infra* pp. 75-77.

77. One commentator gives murder and rape as “manifest grounds of removal for high crimes.” BRANT, *supra* note 36, at 43. In this Brant appears to equate “high” with “serious.” But neither murder nor rape were “high” crimes at common law (unless directed at the sovereign). Given this, Brant’s observation (albeit unwittingly) demolishes the conventional reading of the impeachment provisions in the Constitution.

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4, does not prevent impeachment and removal for such crimes. It simply does not *require* removal upon conviction. The conventional reading of Article II, Section 4, by contrast, leaves the Congress without recourse against a President in office who has committed these crimes and, until the passage of the Twenty-fifth Amendment in 1967, would have left the nation without recourse against a President's incapacity or madness.⁷⁸

The Range of Impeachable Offenses

Given the meaning of "high" crimes, Article II, Section 4—which by its terms does not prevent impeachment for other misconduct—cannot reasonably describe the full range of impeachable offenses. This raises the inevitable next question: what *is* impeachment for? Here also there is an answer in the text of the Constitution and the relevant history.

Impeachment is for crimes. It is, simply, a form of criminal process conducted in Congress. There is an immediate indication of the character of impeachment in Article III, Section 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"⁷⁹ This clause, by the qualifying words "except in Cases of Impeachment," places impeachment squarely in the family of criminal proceedings. Similarly, the President's power in Article II, Section 2, to grant reprieves and pardons does not apply "in Cases of Impeachment." Further underscoring the nature of impeachment as a criminal process is the provision in Article I, Section 3, that the "party convicted" in an impeachment trial remains liable to indictment and trial at law. No exception to the principles of double jeopardy would be necessary if impeachment were not a criminal process.

These textual indications gain considerable force from the history of impeachment in England and America. The framers adopted the impeachment power against a well-known common law background of English and American practice. Indeed, there was an impeachment actually under way in England at the time of the Federal Convention.⁸⁰ From the history of impeachment before 1787 it is possible to reconstruct the general understanding of impeachment that an American lawyer would have had in 1787. Impeachment emerges from this exercise as a common law criminal process, an area of jurisdiction with some power to shape itself, but also governed by precedent.

Throughout its history in England and America, impeachment was concerned with crimes. Blackstone described impeachment as "a pre-

78. See also *infra* p. 77.

79. U.S. CONST. art. III, § 2.

80. It was the impeachment of Warren Hastings. See the remarks of George Mason at the Constitutional Convention, *infra* p. 79.

sentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.”⁸¹ To say that impeachment lies for crimes, however, is only a starting point of analysis and does not mean that an impeachable crime was a statutory crime or an indictable crime triable in the King’s courts. Impeachment was a criminal process with its own body of precedent. Because the jurisdiction of Parliament as a court of impeachment was separate, it was not bound by the precedents of the King’s courts. Impeachable offenses within the jurisdiction of Parliament were governed only by the law of Parliament.⁸² Blackstone allowed that impeachable crimes were something of a class apart:

For, though in general the union of the legislative and judicial powers ought to be more carefully avoided, yet it may happen that a subject entrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish.⁸³

This does not, however, change the fundamental character of impeachment as a criminal process. Indeed, Blackstone had also previously asserted that an impeachment was the “prosecution of the already known and established law”⁸⁴

While undoubtedly a criminal process, impeachment was not limited specifically to “high crimes and misdemeanors.” Throughout its history in England and America impeachment had extended to other offenses.

In England there were, as one would expect, impeachments for treason and corruption. But there were also impeachments for other misconduct, both in and out of office.⁸⁵ In 1681, the House of Commons resolved:

That it is the undoubted right of the Commons, in parliament assembled, to impeach before the Lords in Parliament, any peer or Commoner for treason

81. See 4 BLACKSTONE, *supra* note 46, at *256.

82. See, e.g., *Grantham v. Gordon*, 24 Eng. Rep. 539, 541 (H.L. 1719). (“[I]mpeachments in Parliament differed from indictments, and might be justified by the law and course of Parliament.”)

83. See 4 BLACKSTONE, *supra* note 46, at *258-61. This idea is repeated almost exactly by Wooddeson. See 2 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 596 (London, Thomas Payne 1872).

84. 4 BLACKSTONE, *supra* note 46, at *256. This distinguishes impeachments from attainders. See *id.*

85. See *Case of Lord Mordaunt*, 6 State Trials 785, 790 (Howell 1666) (preventing another from standing for Parliament and making uncivil addresses to a young lady); *Case of Chief Justice Scroggs*, 8 State Trials 163, 200 (Howell 1680) (impeaching for “frequent and notorious excesses and debaucheries”); 4 JOHN HATSELL, PRECEDENTS OF THE PROCEEDINGS IN THE HOUSE OF COMMONS 126 (1818) (“advising and assisting in the drawing and passing of [‘A Proclamation Against Tumultuous Petitions’]”); *Case of Peter Pett*, 6 State Trials 865, 866-88 (Howell 1668) (discussing an impeachment for negligent preparation before an enemy invasion, losing a ship through carelessness, and sending the wrong type of planks to serve as platforms for cannon); *Case of Edward Seymour*, 8 State Trials 127, 128-36 (Howell 1680) (applying funds to public purposes other than those for which they had been appropriated).

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or any other crime or misdemeanor.⁸⁶

Thomas Jefferson had precisely this understanding of the English precedent. In his *Manual of Parliamentary Practice*, Jefferson wrote that the Lords “may proceed against the delinquent, of whatsoever degree, and whatsoever be the nature of the offence.”⁸⁷

In the entire body of impeachment cases and commentary in England impeachable offenses are not once held out as congruent with “high crimes and misdemeanors.”⁸⁸ The view of some commentators⁸⁹ that “high crimes and misdemeanors” described the entire range of impeachable offenses in England is therefore unsustainable.⁹⁰ What may have misled commentators on this point is that the words “high crimes and misdemeanors” were routinely used in the official language of impeachment proceedings—articles and pleadings—in the seventeenth and eighteenth centuries.⁹¹ But by then these words had become jurisdictional for-

86. See Case of Edward Fitzharris, 8 State Trials 223, 236-37 (Howell 1681). See also JOHN SELDEN, OF THE JUDICATURE IN PARLIAMENTS 6 (1690) (stating that the House of Lords may proceed upon impeachment against any person for any offense).

The 1681 resolution was part of a dispute, never entirely settled, between the Commons and the Lords, over which classes of persons were subject to trial by the Lords upon impeachment. See 2 WOODDESON, *supra* note 83, at 601. Like Wooddeson, Blackstone thought that a commoner could not be impeached for a capital offense, but only for a “high misdemeanor” (a crime against the state, not carrying the death penalty), while a peer could be impeached for any crime. See 4 BLACKSTONE, *supra* note 46, at *256-57. Other commentators took a different view of the restrictions on the scope of impeachment of commoners. See Case of Edward Fitzharris, 8 State Trials, at 231-32 & n.t., 236 n.* (note by Howell); cf. 2 WOODDESON, *supra* note 83, at 601 & n.m.

87. THOMAS JEFFERSON, JEFFERSON’S PARLIAMENTARY WRITINGS 113, 423 (Wilbur Samuel Howell ed. 1988). Jefferson also gave the entire body of English rules as controlling in cases of impeachment conducted in the U.S. Congress. See *id.* at 423-26.

88. Wooddeson, whose Laws of England were widely quoted at American impeachment trials, see, e.g., 8 ANNALS OF CONG. 2266, 2287, 2299 (1799), also indicates clearly that impeachment lies for offenses other than “high crimes and misdemeanors.” See 2 WOODDESON, *supra* note 83, at 601, 606. James Stephen concludes that “peers may be tried for any offence, and commoners for any offence not being treason or felony upon an accusation or impeachment by the House of Commons, which is the grand jury of the whole nation.” JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 146 (London, Macmillan 1883). None of these writers anywhere proposes “high crimes and misdemeanors” as the standard for impeachment. Moreover, English law dictionaries from the 18th and early 19th centuries give “crimes and misdemeanors” rather than “high crimes and misdemeanors” as the standard for impeachment. See, e.g., JACOB’S LAW DICTIONARY (O. Ruffhead & J. Morgan eds. 1773); 2 TOMLINS’ LAW DICTIONARY 156 (T. Granger ed., Philadelphia, R.H. Small 1836).

89. See, e.g., BERGER, *supra* note 36, at 67.

90. Berger has difficulty reconciling the narrow scope of “high” misdemeanors in Blackstone with the range of impeachable offenses in English history. See BERGER, *supra* note 36, at 61-62, 86, 89, 92. In an article, Berger concludes 1) that “high crimes and misdemeanors” are words of art specifically describing impeachable offenses, and meaning something other than “crimes and misdemeanors” modified by “high,” and 2) that “nor were ordinary ‘misdemeanors’ a criterion for impeachments.” Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1145 (1974) (footnote omitted). Both conclusions are dubious. On the former, see Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 YALE L.J. 1419, 1427-39 (1975). As to the latter, ordinary “misdemeanors” definitely were a standard of impeachment, as demonstrated below.

91. See ALEXANDER SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS 143-90 (1916).

malities, incantations like "by force and arms" in complaints for trespass before the King's courts.⁹²

In America, where the history of impeachment reaches back to the seventeenth century,⁹³ "high crimes and misdemeanors" were no more than in England the standard for impeachment.⁹⁴ There are definitions of impeachable offenses in the pre-1787 constitutions of nine of the thirteen original states and Vermont. None makes any mention of "high crimes and misdemeanors," and all contain one of the following formulations: "misbehaviour,"⁹⁵ "mal-administration,"⁹⁶ "mal-administration, corruption, or other means by which the safety of the State may be endangered,"⁹⁷ "mal and corrupt conduct in . . . offices,"⁹⁸ or "misconduct and

92. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 n.c. (R. Kerr ed. 1862) (note by Edward Christian, a late 18th century commentator: "When the words *high crimes and misdemeanors* are used in prosecutions for impeachment, the words *high crimes* have no definite signification, but are used merely to give greater solemnity to the charge.") If the words "high crimes" fall out of the phrase "high crimes and misdemeanors" as conventional surplusage, what remains is simply "misdemeanors," i.e., basic criminal wrongdoing. See also BERGER, *supra* note 36, at 59 & n.20. Berger draws the wrong inference from Christian's note, in large part because he apprehends fully neither the meaning of "high" nor its formal use in articles of impeachment. See also *supra* note 53.

When a writ of assumpsit referred to a breach of contract "by force and arms" no actual force or arms were involved. Similarly the incantatory "high" in articles of impeachment did not mean that an actual "high" crime was at issue.

Before 1660 impeachments had in fact been brought in England without even the allegation of "high crimes and misdemeanors" in the articles of impeachment, on charges of being a "monopolist" and a "patentee." See Case of Giles Mompesson, 2 State Trials 1119 (Howell 1620); Case of Francis Michell, 2 State Trials 1131 (Howell 1621). There were also charges of "misdemeanors." See Case of Samuel Harsnet, 2 State Trials 1253 (Howell 1624) (charging him with ecclesiastical malfeasances). And there were charges of "Misdemeanors, Misprisions, Offences, Crimes." See Case of the Duke of Buckingham, 2 State Trials 1267, 1308, 1310 (Howell 1626) (procuring offices for himself "to the great discouragement of others" and letting the navy deteriorate under his command); Case of the Earl of Bristol, 2 State Trials 1267, 1281-82 (Howell 1626) (charging "[c]rimes, Offences, and Contempts"). Some impeachments were brought on charges that were not defined. See SIMPSON, *supra* note 91, at 115.

After 1660, when the words "high crimes and misdemeanors" commonly were added to articles of impeachment, the underlying charges were frequently not "high." See *supra* note 85.

93. Article XVII of the Pennsylvania Charter of 1683 granted the Assembly the power to impeach criminals. See 2 BENJAMIN POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND ORGANIC LAWS OF THE UNITED STATES 1529 (2d ed., Washington, Government Printing Office 1878). In 1684 Nicholas Moore, the first Chief Justice of the Provincial Court, was impeached under this provision. See WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA 61 (1910).

94. As in England, no tribunal or commentator in America before 1787 ever used the words "high crimes and misdemeanors" as a comprehensive statement of impeachable offenses.

95. N.J. CONST. of 1776 art. XII (1776), reprinted in 2 POORE, *supra* note 93, at 1312.

96. PA. CONST. of 1776, § 22, reprinted in 2 POORE, *supra* note 93, at 1545; VT. CONST. of 1777, ch. II, § 20, reprinted in 2 POORE, *supra* note 93, at 1863.

97. VA. CONST. of 1776, reprinted in 2 POORE, *supra* note 93, at 1912; see DEL. CONST. of 1776, art. XXIII, reprinted in 1 POORE, *supra* note 93, at 276-77; N.C. CONST. of 1776, art. XXIII, reprinted in 2 POORE, *supra* note 93, at 1413.

98. N.Y. CONST. of 1777, art. XXXIII, reprinted in 2 POORE, *supra* note 93, at 1337; S.C. CONST. of 1778, art. XXIII, reprinted in 2 POORE, *supra* note 93, at 1624.

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maladministration in . . . offices.”⁹⁹

Despite the breadth of these provisions, impeachment retained the character of a criminal proceeding.¹⁰⁰ The terms describing impeachable offenses in eighteenth century state constitutions (“misconduct in office,” “misbehaviour,” “maladministration”) may not all sound like crimes to modern ears, but they are in fact terms for various types of misdemeanors treated as criminal offenses. Indeed, in the impeachment of Judge Hopkinson of Pennsylvania in 1780, the President of the Council viewed the conclusion that “crimes only are causes of removal” as following directly from the premise that judges hold office “during good behaviour.”¹⁰¹

To sum up the situation in 1787, high crimes and misdemeanors at common law were a precisely bounded class of crimes against the state or sovereign, and did not include many serious crimes of violence or crimes against property. Impeachable offenses in England and America covered a broader range of misconduct, generally criminal. The words “high crimes and misdemeanors” did appear in the official papers of impeachment in England after 1660, but as an incantatory phrase, not an element of substance. Even the words, as far as I can tell, never surfaced in Colonial American impeachments.¹⁰²

Relation of Impeachable Offenses and Judges’ “Good Behaviour”

There is further confirmation, both textual and prudential, of the true meaning of Article II, Section 4, in the provision of Article III, Section 1, concerning the tenure of judges.

Judges hold office “during good behaviour.”¹⁰³ These three words serve both to give judges life tenure and to indicate a standard for their removal. Article II, Section 4, for its part, applies to all civil officers. There is no indication anywhere in the Constitution that judges can be

99. MASS. CONST. of 1780, Ch. 1, § 2, art. VIII, *reprinted in* 1 POORE, *supra* note 93, at 963; N.H. CONST. of 1784, *reprinted in* 2 POORE, *supra* note 93, at 1286.

100. The character of impeachment as a strictly criminal proceeding may have been weakened in some early American practice, but not decisively. Article XVII of the Pennsylvania Charter of 1683 granted the Assembly the power to impeach “criminals.” See 2 POORE, *supra* note 93, at 1529. That power may have come to seem insufficient because the Charter of 1696 included the power to “impeach criminals, or such persons as they shall think fit to be there impeached.” *Id.* at 1535. In the interim, in 1684, the Assembly had impeached Nicholas Moore, the first Chief Justice of the Provincial Court. The articles of impeachment, although formidable in appearance, contained allegations hardly more serious than arbitrariness and arrogance. See LOYD, *supra* note 93, at 60-61 & n.1 (1910).

101. Pennsylvania State Trials 3, 56 (1780). The standard for impeachment in the Pennsylvania constitution of the time was “maladministration.” See *supra* p. 74.

102. Critics of my interpretation of impeachment have argued that the Colonial American antecedents of impeachment are more important than the English ones. But nowhere were “high crimes and misdemeanors” the baseline of impeachable offenses.

103. U.S. CONST., art. III, § 1.

removed in any way other than impeachment.¹⁰⁴ If “treason, bribery, or other high crimes and misdemeanors” in Article II, Section 4, describe the entire range of impeachable offenses, then judges’ “good behaviour” includes all conduct short of “high crimes and misdemeanors.” There is, however, no such connection between judges’ lapses from “good behaviour” and the commission of “high crimes and misdemeanors.” “Good behaviour” is a term of art that means, simply, to commit no crime. “Misbehaviour” (and its close relative “misdemeanor”) was a generic term at common law for criminal misconduct.¹⁰⁵ A federal judge can be removed, therefore, for committing a crime and only for committing a crime. At the Convention of 1787, however, “high crimes and misdemeanors” were not once held out as the test of impeachment and removal of judges. This silence is echoed in *The Federalist*, where Hamilton wrote that impeachment is the only way to remove judges for “malconduct.”¹⁰⁶ Given this, if “high crimes and misdemeanors”¹⁰⁷ are also the sole standard of impeachment, then the tenure of judges takes on a very peculiar tilt. Among other problems, a judge who had committed murder could not be removed from the bench.¹⁰⁸

The difficulty of reconciling judges’ tenure during “good behaviour” with the offenses enumerated in Article II, Section 4, melts away once the latter provision is understood as requiring the removal of officers who have committed “high crimes and misdemeanors” but not excluding their impeachment and removal for “misbehaviour.”¹⁰⁹

Congressional practice in impeachments over the years has been fully consistent with this understanding. Impeachment of judges has not been predicated on their having committed “high crimes and misdemeanors.”¹¹⁰

104. Deliberations at the Federal Convention indicate that judges are removable only by impeachment. On August 27, 1787, the Convention rejected a motion to make the judges removable “by the Executive on the application <by> the Senate and House of Representatives.” 2 FARRAND, *supra* note 10, at 428-29.

105. In the impeachment of Judge Hopkinson of Pennsylvania in 1780 the President and Council, before whom the case was tried, asserted as though self-evident: “[Judges] hold office during good behaviour. . . . Crimes only are causes of removal.” Pennsylvania State Trials 3, 56 (1780).

106. See THE FEDERALIST NO. 79, at 442 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

107. These are crimes against the state, remember.

108. A federal judge can be indicted, to be sure, but indictment and conviction in a court of law do not remove a judge from office. A judge convicted of murder, imprisoned, and later released could therefore return to the bench.

109. The conventional understanding of Article II, Section 4, by contrast, implies that there are two separate tracks of impeachment, one for the “President, Vice President, and all civil officers of the United States” who commit “high crimes and misdemeanors” and another for federal judges who depart from “good behaviour.” The proponents of the conventional view do not always appreciate this implication fully, but it inheres in their view.

110. See the discussion of the Pickering impeachment *infra* pp. 84-86. Also, the articles of

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Similarly, Article II, Section 1, of the Constitution (concerning a President's incapacity) makes dubious sense when coupled with the conventional understanding of Article II, Section 4. Article II, Section 1, provides that in the case of the President's "inability" the office shall devolve upon the Vice President. But nothing there indicates that there is any mode of removal other than impeachment proceedings. The apparent possibility of removal of a President in the event of "inability" cuts against the view of Article II, Section 4, as a comprehensive statement of grounds for impeachment.¹¹¹

The Understanding of Impeachment in the Period 1787-1803

There was considerable debate on impeachment at the Constitutional Convention of 1787. A number of the delegates also had much to say on the question in the period immediately following the Convention and in the First Congress of 1789. Made in the forensic heat of various moments, their utterances do not invariably cohere perfectly.¹¹² In all, however, they add considerable weight to the exegesis of the impeachment provisions that I have expounded here.

Among the delegates to the Convention were proponents of broad and narrow impeachment powers. At an early session (June 2, 1787) the Convention adopted the resolution of Hugh Williamson that the executive be "removable on impeachment & conviction of malpractice or neglect of duty."¹¹³ This clause, which evolved into Article II, Section 4, contains a standard of impeachable offenses. That may be why some commentators see the same in Article II, Section 4, today. But in the

impeachment against Judge George W. English in 1926 contained no allegation of "high crimes and misdemeanors." See 67 CONG. REC. 6283 (1926). The House went on to vote overwhelmingly for articles of impeachment against English containing no allegations of "high crimes and misdemeanors." See *id.* at 6283-87. Four of the five articles of impeachment against Judge Harold Louderback did not mention "high crimes and misdemeanors." See PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HAROLD LOUDERBACK, S. DOC. NO. 73, at 825-31 (1933). In 1936, Judge Halsted Ritter was impeached by the House "for misbehavior and for high crimes and misdemeanors," and convicted by the Senate on a general charge of misbehavior. PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, S. DOC. NO. 200, at 5, 637 (1936).

111. In the First Congress, Representative Smith of South Carolina pointed out that the Constitution "contemplates infirmity in the Chief Magistrate; makes him removable by impeachment; and provides the Vice President to exercise the office, upon such a contingency taking place." 1 ANNALS OF CONG. 528 (1789) (Joseph Gales ed. 1789). Smith was doubtless referring to Article II, Section 1; his understanding of the clause is impossible unless he believed that the scope of impeachment went beyond the terms of Article II, Section 4.

112. Utterances made in the First Congress, though, may be entitled to particular weight because 1) the framing of the Constitution was still freshly in mind, and 2) unlike the records of the Constitutional and Ratifying Conventions (which are for the most part shorthand notes transcribed years later) the Annals of Congress are actual transcripts of statements knowingly made in a public forum.

113. 1 FARRAND, *supra* note 10, at 78-79, 88.

course of the Convention, Williamson's clause became something different.

At a later session (July 20, 1787) the Convention, after protracted debate, adopted Williamson's clause for the draft which was sent to the Committee of Detail. In the course of the debate on July 20, James Madison opposed Gouverneur Morris, who found Williamson's terms too broad:

Mr. Govr. Morris admits corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined:

Mr. <Madison>—thought it indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service was not a sufficient security. He might lose his capacity after his appointment.¹¹⁴

Neither incapacity nor negligence are "high crimes and misdemeanors." Later in the debate, Morris changed his mind, and moved closer to Madison's view: "Mr. Govr. Morris's opinion had been changed by the arguments used in the discussion Corrupting his electors, and incapacity were other causes of impeachment."¹¹⁵

The clause actually adopted on July 20 (by a vote of eight to two) provided that the executive was "removeable on impeachment and conviction for malpractice and neglect of duty."¹¹⁶ If we are to view the current form of Article II, Section 4, as containing the whole of the impeachment power, then the apparent consensus of July 20 simply melted away without a trace.

In the hands of the Committee of Detail, Williamson's clause changed from one in which the President is "removable" for "malpractice and neglect of duty" to one in which he "shall be removed" for "Treason (or) Bribery or Corruption."¹¹⁷ This clause was further modified by the Committee of Eleven. The Senate was made the trier of impeachments, and the only named offenses were treason and bribery:

He shall be removed from his Office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery¹¹⁸

114. 2 *id.* at 65.

115. *Id.* at 68-69.

116. *Id.* at 64, 69. Madison's notes summarize the question put to a vote as "[s]hall the Executive be removeable on impeachments?" *Id.* at 69.

117. The changes are reflected in the notes of a member of the Committee: "He shall be (dismissed) removed from his Office on Impeachment by the House of Representatives, and Conviction in the Supreme (National) Court, of Treason (or) Bribery or Corruption." *Id.* at 172. Farrand indicates that the parts in parentheses are crossed out in the original. *See id.* at 163 n.17. The writing appears to be largely in the hand of James Wilson. *See id.*

118. *Id.* at 497, 499.

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It takes considerable massaging of this clause as it emerged from the two committees to read it as describing the full range of impeachable offenses. To that end the members of the two committees need only have replaced “malpractice and neglect of duty” by “treason or bribery” in the original Williamson clause. To have also replaced “to be removable” by “shall be removed” suggests an additional purpose. And, although an inadvertent change is conceivable,¹¹⁹ it would have been an extraordinary coincidence for the members of the two committees to have adopted the language of mandatory removal unwittingly, and listed far graver offenses than before, without perceiving the changed meaning of the clause before them. To have limited impeachment to treason and bribery would be contrary to the earlier understanding of Madison and Morris on July 20, and would leave an incompetent or insane President beyond the reach of Congress, as well as one who had committed murder, highway robbery, or embezzlement. Rather than put this near-nonsensical construction on the clause that emerged from the Committee of Eleven, it seems obvious to take it to mean what it says: if, on impeachment, the chief executive is found guilty of treason or bribery, he must be removed from office.

The clause from the Committee of Eleven was debated in the Convention on September 8. Before coming to a vote, it elicited the following exchange between George Mason and James Madison:

The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & Bribery, was taken up.

Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after “bribery” “or maladministration.” Mr. Gerry seconded him—

Mr. Madison So vague a term will be equivalent to a tenure during pleasure of the Senate . . .

Col. Mason withdrew “maladministration” & substitutes “other high crimes & misdemeanors” <agst. the State>

On the question thus altered [passed 8 to 3].¹²⁰

Mason perhaps understood the provision before the Convention as describing the full range of impeachable offenses,¹²¹ although his remark by

119. This change was not made in the heat of the moment. Six weeks had elapsed between the referral to the Committee of Detail and the return of the draft to the whole Convention.

120. *Id.* at 550. The conventional understanding of Article II, Section 4, is derived in large part from Mason’s remark.

121. If so, he was mistaken. Mason—who was militant on the question of impeachment, but

no means forces that conclusion.¹²² Nothing in Madison's answer to Mason, however, suggests an understanding that departs from the precise terms of Article II, Section 4.¹²³ The point that so "vague" a term as "maladministration" would be "equivalent to tenure at the pleasure of the Senate" applies with perfectly good sense to a clause governing mandatory removal. If the House brought an impeachment on any offense, the Senate could rationalize a capricious removal by characterizing the offense as maladministration and asserting a duty to remove the President. The words subsequently proposed by Mason, "high crimes and misdemeanors against the State," leave the Senate less room for such maneuvers. A term can be too vague for inclusion in a list of offenses for which removal by Senate is required, while remaining a valid basis for Congress as a whole to exercise discretion. It was Madison, remember, who held out "incapacity" and "negligence" as "indispensable" grounds of impeachment in the debate of July 20.¹²⁴ Unless Madison had a complete change of view in the interim, he was objecting to "maladministration" as a cause of mandatory removal, not impeachment in general.¹²⁵

There is further evidence in Madison's choice of words on September 8 that his concern was excessive action by the Senate under a mandate to remove the President rather than the scope of impeachment in general. Madison remarked that "maladministration" in this clause would be equivalent to tenure at the pleasure of the *Senate*. The Senate by itself has the removal power only. The impeachment power belongs to the House of Representatives.¹²⁶ In subsequent remarks on September 8, where his focus was on the scope of impeachment by the House, Madison asserted that the House could impeach for "any act which might be called a misdemesnor,"¹²⁷ a standard far from congruent with "high crimes and misdemeanors against the State."

What may account for some of the apparently ill-fitting pieces in

had been a member neither of the Committee of Detail nor the Committee of Eleven—may have been expecting the former Williamson clause concerning the offenses for which a President was "removable."

122. Mason's remark makes good sense applied to a provision for mandatory removal.

123. Madison, unlike Mason, had been on the Committee of Eleven, and was more than likely to have firmly in mind the meaning of the clause before the Convention.

124. See *supra* p. 78.

125. Madison embraced "maladministration" as a standard of impeachment in the First Congress. See *infra* p. 82.

126. See 2 FARRAND, *supra* note 10, at 551. A similar point was made two months later by James Wilson at the ratifying convention of Pennsylvania: "[T]he Senate stands controlled. . . . With regard to impeachments, the senate can try none but such as will be brought before them by the house of representatives." MCMASTER & STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 313-38, *quoted in* 3 FARRAND, *supra* note 10, at 161-62.

127. 2 FARRAND, *supra* note 10, at 551.

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Madison's notes on the debate of September 8 is the uneasy coexistence in Madison's own mind between his view of impeachment generally (he was for it) and of the role of the Senate in impeachments (he was against it). Madison was opposed to making the Senate the trier of impeachments in the first place (he preferred the Supreme Court, on the ground of its likely greater impartiality).¹²⁸ Madison brought this view to the Convention of 1787 from his work in drafting the Virginia Constitution, and remained in all matters concerning impeachment, both federal and in Virginia, particularly concerned with defining the Senate's sphere of action and, preferably, constraining it.¹²⁹ Almost certainly Madison had pressed his view, unsuccessfully, in the Committees of Detail and Eleven.¹³⁰ Consider again the way Madison introduces the debate on the provision that became Article II, Section 4, in his notes of September 8: "The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up."¹³¹ This is a somewhat peculiar way to describe the clause reported from the Committee of Eleven, which does not focus on the Senate as directly as Madison's lead-in would suggest.¹³² One might surmise that this was a sore spot with Madison, who evidently had the Senate on the brain that day, perhaps because his views on the Senate's role had not prevailed in the Committee of Eleven.

In this light the Mason-Madison exchange of September 8 does not imply that the Convention rejected "maladministration" as a standard for impeachment. Rather, the Convention accepted "high crimes and misdemeanors against the State" as a standard for mandatory removal by the Senate, after Madison questioned "maladministration" for such a purpose.

A number of later assertions by Madison himself confirm that he neither saw in "high crimes and misdemeanors" the full range of impeachable offenses nor rejected "maladministration" as a ground for impeachment. Speaking before the Virginia ratifying convention, Madison suggested that "if the President be connected in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if

128. See PETER HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 70-75 (1984).

129. See *id.*

130. See *id.*

131. 2 FARRAND, *supra* note 10, at 550.

132. There is another indication of some confusion in Madison's notes. Madison described the provision under discussion as referring to the Senate's power to try impeachments. Mason, though, did not understand the clause that way, pointing out that he thought Warren Hastings was innocent on charges of treason, referring to the former Governor-General of India who was impeached before Parliament in 1787. Here again, Mason and Madison seem to be talking about different provisions. See *id.* at 549-52.

found guilty”¹³³ He later indicated that the President was impeachable for “abuse of power.”¹³⁴ On May 19, 1789, in the debates of the First Congress on the Executive Departments (in which were intermingled numerous comments on the scope of impeachment), Madison distinguished “high crimes and misdemeanors against the United States” from impeachable offenses in general:

I think it absolutely necessary that the President should have the power of removing from office; it will make him in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.¹³⁵

Later in the same debate, on June 16, Madison asserted that the President “is impeachable for any crime or misdemeanor before the Senate, at all times.”¹³⁶ Madison’s most revealing remarks came on June 17 when he suggested that the House could “at any time” impeach and the Senate convict an “unworthy man.”¹³⁷ Madison further contended that “the wanton removal of meritorious officers” was an act of “maladministration” which would subject a President “to impeachment and removal.”¹³⁸

Other standards proposed for impeachment in the First Congress included “misdemeanors,”¹³⁹ “mal-conduct,”¹⁴⁰ misbehav[ior],¹⁴¹ “displacing a worthy and able man,”¹⁴² indolen[ce],¹⁴³ “neglect,”¹⁴⁴ and “infirmity.”¹⁴⁵ None of this misconduct was specifically identified as “high crimes and misdemeanors.”

In the *Federalist* Hamilton gives no systematic analysis of the impeachment provisions of the Constitution, but does comment on several

133. 3 ELLIOT, *supra* note 57, at 498.

134. See *id.* at 516. Among impeachable offenses held out by others at state ratifying conventions were conduct exciting suspicion, see 2 *id.* at 45; “malconduct” and abuse of power, see *id.* at 168-69; making bad treaties, see *id.* at 477; 4 *id.* at 125; an attempt by the President to push a treaty through the Senate without a quorum being present, see *id.* at 268; behaving amiss, or betraying a public trust, see *id.* at 281; “any misdemeanor in office” by the President and giving false information to the Senate, see *id.* at 109, 127; abuse of trust “in any manner” by the President, see *id.* at 114, 276; “any maladministration in his office” by the President, see *id.* at 47; 3 *id.* at 17; and misbehavior, see *id.* at 201. Opinions closer to the conventional view of impeachment were expressed as well in the state ratifying conventions. See 4 *id.* at 48-49; *id.* at 113.

135. 1 ANNALS OF CONG. 387 (Joseph Gales ed. 1789).

136. *Id.* at 480.

137. *Id.* at 517.

138. *Id.*

139. *Id.* at 484.

140. *Id.* at 494-95.

141. *Id.* at 493.

142. *Id.* at 504.

143. *Id.* at 489.

144. *Id.* at 594.

145. *Id.* at 528.

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of the provisions in his traversal of Articles I, II, and III. Hamilton mentions “high crimes and misdemeanors” only once,¹⁴⁶ and not as a baseline of impeachable offenses. Rather, it is in a summary of Article II, Section 4, which would be hard to manage without mentioning high crimes and misdemeanors. In the essay devoted to impeachment, where he takes English impeachments as the “model from which the idea of this institution has been borrowed,” Hamilton makes no reference to high crimes and misdemeanors.¹⁴⁷ Hamilton comes closer to stating the scope of impeachment in his essay on Article III, where he is concerned with the tenure of judges:

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified from holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character¹⁴⁸

In this passage Hamilton evidently means by the “article respecting impeachments” Article I, Sections 2 and 3. The possibilities of impeachment, trial, removal, and disqualification are dealt with there. The standard of impeachment that Hamilton asserts is “malconduct,” for which judges “may” (not “shall”) be removed from office. Thus, unlike today’s commentators, Hamilton does not treat Article II, Section 4, as the main operative provision on impeachment, but seems rather to understand impeachment along the lines I have proposed here.

Although there was considerable reference to impeachment in the early public discourse surrounding the Constitution, there was no systematic exegesis of the impeachment provisions exactly contemporaneous with its drafting and adoption. The earliest concerted analysis of impeachment in the public record came in the first impeachment under the Federal Constitution, that of former Senator William Blount in 1799. Blount, who had been heavily involved in a shady political intrigue, had already been expelled from the Senate. His subsequent impeachment was the occasion for serious forensic excursions into the scope of impeachment. At the beginning of the trial the Managers for the House, James Bayard and Robert Harper, expounded very nearly the entire theory of impeachment that I have proposed here. Specifically, according to Bayard and Harper, the impeachment power is granted to Congress in its established sense and, except as expressly modified, with its common law

146. See THE FEDERALIST NO. 69, at 384 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

147. See THE FEDERALIST NO. 65, at 364-69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

148. THE FEDERALIST NO. 79, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

antecedents; impeachable offenses are not defined in the Constitution; and Article II, Section 4, does no more than specify offenses for which removal of civil officers is mandatory upon conviction.¹⁴⁹ Blount's defense answered with what has become the conventional view of impeachment.¹⁵⁰ For those to whom seniority in time matters, I should point out that the theory of impeachment that I have proposed here was chronologically the first to be expounded systematically in a public forum.¹⁵¹

Several key questions on the scope of impeachment arose in the case of Judge John Pickering in 1803, the first federal impeachment to result in a conviction.¹⁵² The most important element in the Pickering case is the Senate's rejection of "high crimes and misdemeanors" as the standard for impeachment and removal. The case also bears on the range of possible judgments in impeachment trials.

Both the debate and action taken in the Senate in the Pickering case were explicit. Pickering was impeached for drunkenness on the bench and other misconduct. The defense was that Pickering, being insane, could not be guilty of a crime, and in particular had not committed high crimes and misdemeanors. When the trial came down to a vote on Pick-

149. See 8 ANNALS OF CONG. 2251-53, 2298-99, 2301-04 (1799). There are smaller strokes as well, including Harper's insistence on the possibility of lesser penalties than removal, such as censure. See *id.* at 2302.

150. See *id.* at 2263-67. The Blount case went off on the ground that a Senator is not subject to impeachment for crimes committed in office, see *id.* at 2318, leaving the other questions unresolved. There was later some forensic sparring by the same players in the Pennsylvania impeachment of Judge Shippen in 1805, where Blount's former counsel Jared Ingersoll underscored the common law antecedents of impeachment in a case where the prosecution sought to dispense with all requirement of criminality in an impeachment for "misdemeanor." See HOFFER & HULL, *supra* note 128, at 221-26.

151. This is because Bayard spoke first, a day before any of Blount's defense counsel. Some readers may wonder at the significance of this chronology. Apart from any intrinsic import, it undercuts entirely the erroneous claim by several critics of my theory of impeachment, among them Judge Bork, that the theory must be dismissed because it crossed absolutely no one's mind in the early years. See *infra* pp. 94-95. The opposite is plainly the case.

Both interpretations of the impeachment provisions were also advanced in the impeachment trial of Justice Samuel Chase in 1805. The defense held out Article II, Section 4, as an exhaustive definition of impeachable offenses. See 14 ANNALS OF CONG. 432 (1805). One of the managers of the Chase impeachment (Representative Rodney of Delaware) held out Article II, Section 4, as requiring removal for the specified offenses, stressing both the common law background of impeachment and the relation between the possibility of lesser judgments and the command of Article II, Section 4. See *id.* at 591-607.

The lead counsel for the defense in the Chase impeachment, Luther Martin, set the stage for a long tradition of constitutional scholarship by quoting Article II, Section 4, erroneously in making his argument: "The words of the Constitution are, 'that *they shall be liable to impeachment* for treason, bribery, or other high crimes and misdemeanors.'" *Id.* at 432 (emphasis added). Martin's misstatement of the words surfaces persistently in modern-day commentary as though it were the actual language of Article II, Section 4. See the inadvertent use of Martin's formulation by Cass Sunstein and Vikram Amar, in note 34 *supra*.

152. The Pickering case was in fact the only impeachment trial before 1936 in which there was an actual finding of guilt from which one can draw inferences about the range of impeachable offenses.

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ering's guilt, one of Pickering's defenders, Senator White proposed the following question for judgment:

Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the ____ article of impeachment, or not guilty?¹⁵³

Senator Anderson offered instead:

Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the ____ article of impeachment exhibited against him by the House of Representatives?¹⁵⁴

Anderson's formulation was adopted by the Senate.¹⁵⁵ In opposition, and in defense of his own question, Senator White argued that, while Pickering "had acted illegally and very unbecoming a judge,"¹⁵⁶ no part of his conduct amounted to high crimes and misdemeanors, that Senator Anderson's question did not establish "directly or indirectly whether those acts amounted to high crimes and misdemeanors or not," and that to convict on Anderson's question would establish that "it will not hereafter be necessary that a man should be guilty of high crimes and misdemeanors in order to render him liable to removal from office by impeachment. . . ."¹⁵⁷ Senator Dayton argued that "[t]he Constitution gave no power to the Senate, as the High Court of Impeachments, to pass such a sentence of removal and disqualification, except upon charges and conviction of high crimes and misdemeanors" and proposed that after each determination of guilt there be a further vote "whether those facts, thus proved and found, amounted to a conviction of high crimes and misdemeanors. . . ."¹⁵⁸ The Senate proceeded to find Pickering guilty in the exact terms of Senator Anderson's question by a vote of 19 to 7.¹⁵⁹ The explicitness of the preceding debate underscores the import of the Senate's action: it found guilt without specifying that Judge Pickering's offenses were high crimes and misdemeanors.

Having found Pickering guilty, the Senate passed a judgment of removal by a separate vote of twenty to six.¹⁶⁰ If no lesser sanction than removal were possible, this second vote would have been unnecessary. Therefore the second vote both confirms the possibility of lesser judgments implied by Article I, Section 3, and, more importantly, brings into

153. 13 ANNALS OF CONG. 364 (1803).

154. *Id.*

155. *See id.*

156. *Id.*

157. *Id.* at 365.

158. *Id.* at 365-66.

159. *See id.*

160. *See id.*

sharp focus the Senate's understanding of Article II, Section 4. Because Pickering had not been convicted of "high crimes and misdemeanors," removal was not mandatory and the Senate had to take separate action on the question.¹⁶¹

The Pickering impeachment is often overlooked or brushed aside by academic commentators. Given its early date and the explicitness of the inferences that it allows, the case is in fact both important and revealing. Let me underscore that the theory of impeachment that I propound here accounts perfectly for the Senate's action in the Pickering case, while the conventional view does not.

Censure and Other Penalties in Impeachments

The implications of the separate vote on removal in the Pickering impeachment are particularly germane to the late impeachment involving President Clinton. Because President Clinton's misconduct—on any theory of impeachment—was on the milder end of the scale of gravity, various forms of censure were proposed from different quarters as a more apposite resolution than removal from office. The idea of censure, while it had widespread appeal,¹⁶² ran into the entrenched view that removal from office or acquittal are the only possible outcomes of impeachment proceedings. Censure was therefore generally proposed as a separate and alternative congressional action.

There can of course be congressional "censure" wholly apart from impeachment. A resolution of both Houses "censuring" President Clinton would have been, at bottom, an expression of Congress's opinion of his conduct.¹⁶³ Such a rebuke was clearly within Congress's power, and

161. Readers of an earlier draft of this paper have suggested that the Senate's separate vote on removal in the Pickering case can be viewed merely as an entry of judgment and does not imply separate discretionary action on the penalty to be imposed. Such an understanding of the proceedings in the Pickering case is, however, hard to sustain. When a verdict is rendered by a jury, judgment is entered by the court. When sentence is mandatory, there are no separate deliberations by the body rendering the verdict. In an impeachment trial, the Senators are both jurors and judges. If in the Pickering case removal had been a necessary consequence of conviction, the presiding officer should have entered the conviction and declared that Pickering would be removed from office. The only possible further vote would be on future disqualification. A separate vote on removal in such a case would be a serious mistake. Suppose there were a conviction in an impeachment trial by an exact two-thirds vote of the Senate and then, in a separate vote on removal called by the presiding officer, removal failed by one vote. (The vote count for removal in the Pickering case was different, remember, from the vote for conviction.) Has the Senate then retroactively rescinded the conviction and acquitted, or what? To suppose that the Senate viewed removal from office as a necessary consequence of conviction in the Pickering case but went ahead with a separate vote anyway is to impute to the Senate a gross procedural blunder that could have caused real mischief. That is not impossible, of course, but nor is it the way to lay your bet.

162. The *New York Times*, for example, editorialized early and often that some form of congressional censure of President Clinton was the best course.

163. Think of it as a kind of Gulf of Tonkin Resolution in reverse. Instead of "The President

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might have satisfied a large segment of the public.¹⁶⁴ This form of censure, however, does not have much bite. Those who wanted to inflict serious pain on the President would have been left unrequited.¹⁶⁵

Censure, as I have suggested above,¹⁶⁶ is also a possible outcome of impeachment proceedings in some cases. The relevant clause of the Constitution, Article I, Section 3, prevents judgments in cases of impeachment from extending further than removal from office and disqualification, but not *less* far in cases where the impeachable misconduct falls short of “high” crimes. Blackstone expressly acknowledged among the penalties in impeachments “discretionary censures, regulated by the nature and aggravations of the offence committed.”¹⁶⁷

What drew many to the idea of censure in the latest impeachment (though few could see their way clear on the mechanics) was that the offenses charged against President Clinton were not momentous concerns of state. Indeed the President’s misconduct in my view fell short of “high” crimes and misdemeanors, if these are understood in their technical sense at common law. The President was alleged to have lied before a grand jury where the truthfulness of his prior deposition in a civil suit was at issue, and to have sought to influence the testimony of others in related proceedings. Although some perjury—in a major federal criminal prosecution, for example—might rise to the level of obstruction of justice (and therefore a “high” crime within the jurisprudence of impeachment), the harm to the state here was indirect and, comparatively, attenuated.¹⁶⁸ Similarly, a suggestion of false testimony is generally less damaging to the machinery of justice (and harder to apprehend with certainty) than dissuading or preventing the appearance of a witness altogether.¹⁶⁹

did well,” it would mean, “He acted badly.”

164. Note, though, that censure was held out at various points by the President’s supporters mainly to parry the force of impeachment. After the acquittal in the Senate, the idea of censure retained little momentum of its own.

165. After the acquittal, it was the Republicans in the Senate who beat back a Democratic-sponsored censure motion.

166. See *supra* p. 65.

167. 4 BLACKSTONE, *supra* note 46, at *141.

168. Much was made in the media of a hapless woman convicted of perjury for lying about sex in a deposition. See, e.g., William Glaberson, *Testing of a President: Legal Issues*, N.Y. TIMES, Nov. 17, 1998, at A1. But she had denied having sex with the complainant in a sexual harassment suit, where the sex was the essential element of the claim against her. The lie, therefore, was centrally related to the claim. Monica Lewinsky brought no claim of any kind against President Clinton. I defy any reader to show me one person ever convicted of perjury for having falsely denied an adulterous affair in a divorce proceeding, a situation much closer to President Clinton’s.

169. For what it is worth, Blackstone does not specifically include perjury among high misdemeanors, but does include dissuading a witness from giving evidence. See 4 BLACKSTONE, *supra* note 46, at *126. This does not, however, appear to include suggesting false testimony. See *supra* note 59 and accompanying text. I should also caution against taking Blackstone’s catalog of “high misdemeanors” as talismanic. Blackstone classifies high misdemeanors with a fairly broad brush, and the distinction between them and other crimes had a different (and lesser) sig-

The possibility of censure has implications beyond allowing an alternative, milder penalty when the offenses are not "high." If censure can be imposed as a penalty upon conviction in those cases, then an accused could also accept censure as a form of settlement of impeachment proceedings short of trial.¹⁷⁰ Arising in this way (as a plea bargain, in effect, with a two-thirds vote of the Senate to back it up), censure would stand as a conviction in impeachment proceedings and would be far more than a simple unilateral rebuke from Congress. Among the differences between this type of censure and a simple congressional resolution is that in impeachment proceedings Congress is exercising a *judicial* function. The Senate's censure therefore could not be rescinded or cancelled by any subsequent *legislative* act of Congress.¹⁷¹

What about fines as lesser penalties than removal from office in impeachments? In today's legal environment I think fines should be viewed as more severe than removal and hence not available in impeachments. Because the range of penalties in English impeachments was unlimited, there was little or no occasion for commentators on English law to consider exact relative degrees of severity. It seems nearly self-evident that death or imprisonment are more severe than loss of office.¹⁷² Beyond that, the order in which Blackstone lists penalties in impeachment appears to be somewhat random.¹⁷³ Even if fines could be considered lesser penalties than forfeiture of office at common law, the same relative severity would

nificance in English impeachments.

Commentators on the Clinton impeachment tended to choose vocabulary to describe his conduct that abetted their spin on the case. Political opponents intoned, mantra-like, the words "perjury and obstruction of justice." See Edwin Meese III & Todd Gaziano, *Two Impeachment Votes Could Cause Long-Term Harm*, ROLL CALL, Feb. 4, 1999. Clinton's supporters used words like "sex" to describe the President's conduct. See, e.g., ALAN DERSHOWITZ, *SEXUAL MCCARTHYISM: CLINTON, STARR AND THE EMERGING CONSTITUTIONAL CRISIS* (1998).

170. At one stage of the proceedings, in late 1998, President Clinton's lawyers indicated that he would accept a resolution of censure from Congress and pay a fine in the bargain, as an alternative to impeachment proceedings. The Republicans in the House, wanting more than half a loaf, brushed the offer aside.

171. Some who questioned the effect of a simple censure resolution pointed out that Congress could later revoke it, as in fact occurred after the censure of Andrew Jackson. The Senate's rebuke of Jackson in an 1834 resolution was not literally termed a "censure" but has been (correctly) understood as such since then. The resolution simply asserted that Jackson had acted illegally, beyond his constitutional authority. See 10 CONG. DEB. 1187 (1834); 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 1040 (1907); ROBERT REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845*, at 137-55 (1984). Two years later, the Senate withdrew its action. See REMINI, *supra*, at 155.

172. Also, these are part of the battery of criminal penalties available after removal, by virtue of Article I, Section 3, in regular criminal proceedings.

173. See 4 BLACKSTONE, *supra* note 46, at *121, *141. I thought at one time, from the order in which Blackstone lists these penalties in certain passages, see, e.g., *id.* at *141, that Blackstone might have regarded fines as lesser penalties than forfeiture of office. On reconsideration it appears that the order in which Blackstone lists penalties in impeachments has no clear pattern. See *id.* at *121.

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not hold today. In eighteenth-century England, many public offices had the character of vested property.¹⁷⁴ They could be purchased, sometimes inherited, and constituted a permanent income stream as well as a social status. The forfeiture of an office of this sort, given its economic and social consequences, could well be worse punishment than a fine. Today, when public offices have lost the character of property,¹⁷⁵ fines must be considered more severe penalties than removal from office or disqualification, or at the very least so hard to gauge on the scale of severity that the imposition of a fine in impeachment would be dubious as a matter of due process of law.¹⁷⁶ A conscientious Senate should therefore consider fines outside the range of penalties in impeachments.¹⁷⁷

There are no such doubts about censure. In no plausible scale of severity is a rebuke, however solemnly framed, more severe than expulsion from office. And someone who could have been removed from office or disqualified can hardly be unfairly surprised at being reprimanded instead.¹⁷⁸

And last, although it fits in no particular category of penalty in impeachments, is the “finding of fact,” a proposal that surfaced in the waning days of the Senate trial. The idea would hardly be worth mentioning here had it not been, variously, attributed to me or premised by its proponents on my theory of impeachment. The plan consisted of a “finding of fact” by the Senate, adopted possibly by a simple majority before the final vote on conviction or acquittal, asserting that President Clinton had in fact engaged in various specified misconduct. After the finding of fact were the further possibilities of proceeding to judgment or dismissing the proceedings without final verdict.

The “finding of fact,” plainly, is a simple censure resolution by the Senate rolled into impeachment proceedings. It would constitute nothing more than the expression of the opinion of a majority of the Senators that President Clinton had done some bad things. It has no intrinsic relation to impeachment at all. It is an *obiter dictum* by a subset of judges too small to convict.¹⁷⁹ While constitutional, I think, such an action by the Senate

174. Note that Blackstone refers to “forfeiture of office” rather than “removal” as a penalty.

175. I mean here transferable property in the narrow titular sense. In some contexts today an office can be understood as a property interest, as can reputation.

176. As discussed further below the imposition of a fine would, in this light, be subject to possible judicial review. See *infra* pp. 91-92.

177. Of course if a defendant offered to pay a fine in settlement of an impeachment (as the President’s counsel proposed as part of a censure arrangement in late 1998) it would be a different story.

178. Besides censure, other judgments of the same nature as removal and disqualification that clearly extend “less far” include enjoining misconduct and temporary suspension.

179. While a simple majority can adopt procedures under the Senate rules, any operative element of a *conviction* in an impeachment trial must pass by a two-thirds vote.

would be inapposite.¹⁸⁰ Impeachment is not the natural habitat of a simple censure resolution.¹⁸¹

Some proponents of a "finding of fact" imagined that it was derived from my theory of impeachment. It was even called at least once the "Isenbergh Proposal." If, however, my contention that conviction of non-"high" crimes need not entail removal from office triggered the idea of a finding of fact separate from the vote on guilt, it did so fortuitously. The finding of fact proposal, precisely because it had no decisive relation to the main event, was actually consistent with *all* the theories of impeachment that were in play at the time. No action of the Senate, by whatever name, can stand as a conviction in impeachment short of a two-thirds vote. Since the finding of fact was not a conviction of any kind, it was irrelevant to its meaning or validity whether high crimes and misdemeanors are the only impeachable offenses or removal is the sole penalty.

Many of the adherents of the finding of fact plan, sad to say, and nearly all of its opponents,¹⁸² misunderstood the underlying theory of impeachment from which they imagined it sprang. Some called the plan the "split vote" approach because they thought that my view of impeachment implies separate votes on guilt and removal.¹⁸³ That is not the point at all. In an impeachment for a *high* crime only one vote is possible on the questions of guilt *and* removal from office. The only possible separate vote is on disqualification for future office. Where an impeachment is not for

180. The finding of fact would be something like a tongue-lashing by a judge expressing disapproval of a defendant's conduct prior to an acquittal, an action within the judge's power but not particularly called for by the judicial function.

181. Showing both parliamentary scruple and a clear understanding of the situation, some Senators (including Joseph Lieberman and Daniel Patrick Moynihan) proposed that the Senate temporarily adjourn as a court of impeachment, convene as a legislative body, censure the President based on findings of fact, then reconvene as a court to acquit him. See, e.g., *Capitol Hill Hearing with White House Personnel*, FED. NEWS SERVICE, Jan. 27, 1999 (statement of Sen. Lieberman). This intelligent (though cumbersome) proposal was ignored by millions.

182. See the discussion *infra* pp. 92-95 of Judge Bork's criticism of the finding of fact and my analysis of impeachment. One critic commenting on the findings of fact proposal imputed to me a theory of impeachment that not only is nonsensical on its face, but bears not even a passing resemblance to my actual views on the subject:

Professor Isenbergh recently amended his earlier proposal in light of the current political situation and suggested that the Constitution allowed the House to impeach, and the Senate to convict, certain kinds of officials for misconduct that did not rise to the level of impeachable offenses. . . . According to Professor Isenbergh, only removal, as opposed to conviction, constitutionally required a two-thirds vote of the Senate and proof or evidence of impeachable offenses.

Michael Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 36 (1999). This encapsulation of my writings is so distorted as to strain the limits of good faith misunderstanding. I can't imagine where I might have "amended" some "earlier proposal" or what that proposal might be. Assuming this excerpt is not a deliberate misstatement, then either Professor Gerhardt or his research assistants need new reading glasses.

183. See Richard Whittle & David Jackson, *Witness Tapes Could Be Aired on Senate Floor; GOP Plan Maps Trial's Finish*, DALLAS MORNING NEWS, Jan. 29, 1999 at 1A (quoting a White House spokesman as questioning a "split vote").

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high crimes, as in the Pickering case, a separate vote on removal (or some other penalty) *is* possible after conviction, and that is in fact what happened there. But even then it would also be possible to combine the two votes. And in a borderline case, such as the one involving President Clinton, that might be preferable.¹⁸⁴

The Aftermath of Impeachment

After a trial in the Senate, what further proceedings involving the same defendant and subject matter are possible in the courts? Can a conviction be reviewed by a federal court? Is a person acquitted or convicted in impeachment subject to further prosecution at law for the same offenses?

As spelled out further below, the possible scope of judicial proceedings after impeachment is narrowly framed by Article I, Section 3, and the Due Process Clause.

First, there is no direct review of impeachments on the merits in the courts. The judicial power exercised by the Senate in impeachments is separate from the power of the courts under Article III of the Constitution.¹⁸⁵ No federal court stands as a court of appeals from the Senate. On such basic questions as guilt or innocence, or the scope of impeachable offenses, the Senate's judgment is final.

This does not mean, however, that the courts cannot concern themselves with impeachments at all. An action of the Senate in impeachment, if amounting to a fundamental failure of process, can be attacked in court, as can any grievous denial of due process of law. The Fifth Amendment's guarantee of due process of law is a categorical imperative, good for the benefit of any person against any action by any part of government.¹⁸⁶ The basis for attack on impeachment proceedings would be informed by the historical standard of habeas corpus, to wit, that the essential element of an actual adjudication was lacking or that the action taken by Congress was beyond the outer limit of its power. This would cover such aberrant actions as conviction by a simple majority in the Sen-

184. The proponents of a milder penalty, such as censure, would not want to vote separately on guilt without assurance that removal would not ensue. They would therefore urge the adoption of a question combining the determination of guilt with the imposition of censure. Failure of a two-thirds vote for the proposition would, of course, mean acquittal. Note that in the Pickering case the Senate debated and voted on different forms of the final verdict. *See supra* p. 89. The final vote on guilt was fully presaged by the earlier votes.

185. Impeachment is mentioned in Article III, Section 2, but only to exempt cases of impeachment from the requirement of trial by jury.

186. "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This imperative does not depend on the existence of any appellate jurisdiction and, because of it, a denial of due process of law frames a question "arising under" the Constitution, i.e., a fit subject of judicial consideration.

ate, the agreement of two-thirds of the Senate to abide by the result of a coin toss by the presiding officer, or the imposition of a prison sentence or death on a defendant.¹⁸⁷ These are, of course, extremely remote possibilities.¹⁸⁸

A more immediately practical question is the possibility of indictment of a defendant after impeachment proceedings.¹⁸⁹ The question has two branches, according to the outcome of the impeachment in conviction or acquittal, the latter being of some lingering theoretical concern for President Clinton. Article I, Section 3 provides explicitly that the party *convicted* in an impeachment “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” Therefore an officer convicted in impeachment can subsequently be prosecuted at law, although in the President’s case only if removed from office.¹⁹⁰

As for the effect of an acquittal in impeachment, the apparent academic consensus (under the influence perhaps of the effect of conviction in Article I, Section 3) is that acquittal also is no bar to further indictment and prosecution at law. Here I think the consensus is wrong. An acquittal in impeachment should bar further prosecution for the same crime to the same extent as an acquittal in any criminal proceeding. The exception to the protection from double jeopardy in Article I, Section 3, extends only to a “party convicted” in an impeachment. There is no explicit effect of an acquittal. It is entirely sensible to afford an accused protection from double jeopardy after an acquittal in impeachment (but not a conviction),

187. The first would be the transformation of an acquittal into a conviction by fiat; the second the failure to engage in even the simulacrum of an adjudication; and the third a deprivation of life or liberty by a tribunal not empowered to do so. In the latter case habeas corpus would be available to the defendant. While the first two involve no deprivation of life or liberty, and are therefore outside the literal scope of habeas corpus, both implicate substantial elements of property and reputation.

188. If any of them ever occurred it would likely mean that the United States had retained at most the bare forms of republican government, much as Rome in the first century A.D.

189. There was a leak from the Office of Independent Counsel in early 1999 that Kenneth Starr had concluded that indictment of a sitting President was possible in light of *Clinton v. Jones*. See *supra* note 24. This opened the further possibility of an indictment of President Clinton at the conclusion of the impeachment proceedings.

190. Some readers of an earlier draft of this article suggested that my interpretation of the impeachment provisions, in light of the “indictment” clause of Article I, Section 3, implies that a sitting President *is* subject to indictment. If a President can be convicted in impeachment of non-high crimes and *not* removed from office, as I argue from other provisions, then doesn’t Article I, Section 3, expose him, as a “party convicted,” to indictment, trial, and punishment while in office? The answer is: absolutely not. Article I, Section 3, simply cuts off the defense of double jeopardy, leaving conviction in impeachment no bar to further prosecution. It does not affirmatively expose to indictment or prosecution someone who is otherwise immune. Therefore if a sitting President is immune from prosecution, conviction in impeachment does not change that; only removal does. Notwithstanding Article I, Section 3, a President impeached and convicted but not removed from office (unlike any other civil officer in this position) still cannot be indicted until out of office. As a provision to establish the exposure of a sitting President to indictment, Article I, Section 3, would be both awkward and impossibly oblique.

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and possibly necessary as a matter of due process of law. Someone found guilty upon impeachment for the most serious crime, such as murder or treason, ought not to be beyond further account simply by forfeiting office. Also, because of the conviction, the likelihood of guilt is not yet bounded by any failure to meet a standard of proof.¹⁹¹ But acquittal in impeachment has no such corollary. The jeopardy of conviction in impeachment is somewhat greater than in a court of law. The required vote is two-thirds, and the standard of proof, although far from crystal-clear, is probably lower. After an acquittal the likelihood of guilt is significantly bounded by the failure to convict. The acquitted party, having defeated a greater likelihood of conviction, *a fortiori* ought not to face the same charges again.¹⁹² President Clinton in my view should therefore face no further proceedings concerning his alleged perjury and witness-tampering, either during the remainder of his term or later.

The possibility of an indictment of President Clinton while in office, an idea allegedly leaked from the Office of Independent Counsel in the late days of the Senate trial, should now be considered foreclosed by the outcome of the impeachment on the simple ground of double jeopardy. Setting that point aside, Kenneth Starr apparently concluded from the Supreme Court's decisions in *United States v. Nixon* and *Clinton v. Jones* that a sitting President is in fact subject to indictment.¹⁹³ For this, Starr was subjected to an outpouring of criticism. Although I think his conclusion erroneous from first principles, as I have inflicted on the reader at some length above, within the boundaries of his role as a prosecutor Starr's conclusion on this point was impeccable. Indicting is a prosecutor's job, and there is no reasonable way to read *Clinton v. Jones* that does not strongly imply a President's exposure to indictment while in office.

Critics

The analysis of impeachment that I have propounded surfaced briefly in early 1999 during the last days of the trial in the Senate.¹⁹⁴ It was at-

191. It goes without saying, however, that the conventional standard of "beyond reasonable doubt," must be met for subsequent conviction at law, regardless of the standard of proof applied in the impeachment.

192. This conclusion is not based specifically on the double jeopardy clause of the Fifth Amendment—literally no "life or limb" is in jeopardy—but on a broader notion of due process of law. It is now fully established that due process of law implies protection against double jeopardy extending beyond possible forfeiture of life or limb and including proceedings across different jurisdictions.

193. See Van Natta, *supra* note 24, at A1.

194. An earlier draft of this article posted on the University of Chicago Law School's Web site was cited with approval by a journalist, see Stuart Taylor, *Conviction Need Not Mean Removal*, N.Y.L.J., Jan. 25, 1999, at 15, and by a law professor. See Douglas W. Kmiec, *Convict, but*

tacked, in print and on the airwaves, by the full spectrum of established constitutional scholars, from icons of originalism to modernists. Some within this group took apparent umbrage at an analysis of impeachment from someone outside the constitutional law fraternity.¹⁹⁵ Judge Bork termed the theory “grotesque,” arguing that it created a contradiction between Article II, Section 4, and Article I, Section 3, thereby “gratuitously” charging the framers with sloppy draftsmanship. The opposite is in fact the case. My reading of Article II, Section 4, and Article I, Section 3, harmonizes them perfectly; Judge Bork’s far more loosely.¹⁹⁶ It is the conventional reading of the impeachment provisions, indeed, that opens wide textual discontinuities, among which are nearly irreconcilable standards for the removal of judges and other civil officers.

Judge Bork’s broader contention is that “[o]ne is entitled to be suspicious of a constitutional interpretation that nobody thought of for over 200 years” and he takes my interpretation to task “for discovering wholly unexpected meaning in ancient language.”¹⁹⁷ In this he is simply, flatly, wrong. Not only are there considerable contemporaneous indications of this understanding of impeachment—so much so that it might well have been the dominant view from the start—but this interpretation was the first to be propounded systematically in a public forum, in the impeachment of William Blount in 1799.¹⁹⁸ It was, further, expounded in the impeachment of Justice Chase in 1805. Most important, the first federal im-

Don't Remove Clinton, WALL ST. J., Jan. 29, 1999, at A21. My views apparently also influenced the proponents of “findings of fact” in the Senate. See *supra* pp. 89-90.

195. Akhil Amar noted pointedly in the *Legal Times* that “a vast chorus of distinguished constitutional scholars, right, left, and center” stood against “tax law Professor Joseph Isenbergh” on this issue. Akhil Reed Amar, *If You Convict, You Must Evict*, LEGAL TIMES, Feb. 8, 1999, at 19 [hereinafter Amar, *If You Convict*] (emphasis added). In another missive Amar wrote: “Many of us have studied the Constitution and its history for years—week in, week out. Can . . . Joseph [Isenbergh] (a . . . tax lawyer) claim the same?” Akhil Reed Amar, *Amar Responds to Taylor*, AMERICAN LAWYER MEDIA (Feb. 8, 1999) <<http://www.lawnewsnetwork.com/opencourt/backlog/c020899b.html>> [hereinafter Amar, *Amar Responds to Taylor*]. Judge Bork observed in the Wall Street Journal that “Joseph Isenbergh, a tax expert at the University of Chicago, first developed” what he calls a “grotesque” version of constitutional law. Robert H. Bork, *Read the Constitution: It's Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at 21A (emphasis added). Since both Professor Amar and Judge Bork seem to think that the occupation of proponents of constitutional analyses is a relevant concern to their readers, I want to let them know that when I first worked out this interpretation of the impeachment provisions I was not a tax specialist, but a law student. James Bayard and Robert Harper, meanwhile, who propounded much the same analysis in 1799, were members of the United States House of Representatives.

196. It is clear in Judge Bork’s piece that he did not entirely assimilate my analysis of impeachment. He suggests as a “pernicious result” of this analysis that under it Congress might have impeached and condemned Ronald Reagan by majority vote through a “finding” of “high crimes and misdemeanors” in connection with the Iran-Contra matter. Congress could, no doubt, have done that, but no less under Judge Bork’s theory of impeachment than mine. This is a red herring. Nothing constitutes a conviction in the Senate short of a two-thirds vote.

197. See Bork, *supra* note 193, at 21A.

198. See *supra* pp. 83-84.

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peachment to end in an actual conviction carrying full precedential weight—that of Judge Pickering in 1803—can be accounted for *only* under the theory of impeachment that I propound here. The explicit terms of the debate in that case leave little doubt of this conclusion.

My colleague Cass Sunstein has made, far more temperately than Judge Bork, a similar point. He asks how Article II, Section 4, can mean what I argue, when that meaning was not explained contemporaneously during the founding and ratification debates.¹⁹⁹ Underlying Sunstein's observation, I believe, is a faulty premise reflecting a misunderstanding of the import of the historical materials. That puts it a bit strongly, perhaps, and I might more properly say that time has misdirected our focus on these materials. Nowadays we expect our laws to emerge accompanied by concerted legislative histories in which they are systematically expounded. The records of founding and ratifying debates are not, however, legislative histories in this sense. Farrand's *Records of the Constitutional Convention*, for example, are commonly invoked as though they were a sustained legislative history. They are in fact shorthand notes, taken largely by Madison, published after Madison's death, in 1840. They are not verbatim, and comprehend only part of the proceedings. The deliberations of the Committees of Detail and Eleven, from which emerged the bulk of the Constitution, are black holes. Not one word of the deliberations there has survived in print. The framers did not produce systematic recapitulations of their work. And it is here, I think, that a dubious premise has crept into the suggestion that I must establish my precise reading of the Constitution with contemporary exegesis. *No* concerted interpretation of any part of the Constitution can hold up to the requirement that it be attested by systematic elaboration and detail provided contemporaneously by the framers. The conventional view of impeachment holds up rather less well to that requirement than mine does. It was not systematically expounded until later.

Let us consider the question from the other side. Sunstein's view of Article II, Section 4, implies that the Committee of Eleven, with full deliberation, chose *not* to include among impeachable offenses the "egregious or large-scale abuses of authority" related to "the exercise of distinctly presidential powers" that he considers to be the core of presidential "high crimes and misdemeanors,"²⁰⁰ (terms added to Article II

199. See Sunstein, *supra* note 2, at 279, 293 n.60. In conversation Sunstein has asked more pointedly why there was no explanation when that clause came from the Committee of Eleven to the main Convention in September 1787. David Currie has made similar observations to me in conversation.

200. The provision reported from the Committee of Eleven, remember, mentioned only treason and bribery.

only later, after a passing sidebar between Mason and Madison on September 8). Why was there no contemporaneous explanation of the remarkably narrow scope of the clause reported from the Committee of Eleven, when the entire Convention had previously endorsed "malpractice and neglect of duty" as grounds of presidential impeachment? If you cannot accept an understanding of a provision that was not fully expounded at the time, then the reading of the mandatory language of Article II, Section 4, as a definition in the conventional view is unaccountable.

More than likely there was no single understanding of impeachment among the framers, any more than there was a perfectly uniform expectation of the scope of presidential immunity. It is the balance of textual inference and historical evidence that weighs in favor of my interpretation of both.

Akhil Amar raised several objections in print and on the Internet. The point on which he is most exercised is that impeachment, as I understand the constitutional provisions concerning it, is not limited to "civil officers" (the objects of Article II, Section 4), but may extend to other persons under the impeachment power granted to Congress without limitation in Article I, Section 3. This Amar finds disqualifying and, in a *reductio* of sorts, offers the following catalogue of horrors flowing from my theory of impeachment, which, as he spins it, implies possible impeachment of any person for any conduct:

[Y]ou, dear reader, could be impeached—for lying about your sex life, or for supporting a president who lies about his, or for jaywalking. Once convicted by the Senate, you could be forever barred from holding federal office. . . . By this logic, Congress would have been free in, say, 1850 to permanently ban all abolitionists (then a small minority, but growing fast) from future office holding. In the New Deal, when Democrats held huge congressional majorities, they could have rendered all registered Republicans permanently ineligible to hold office. Thus, we see how revisionism threatens not only separation of powers, but also basic civil liberties. This is a dangerous thesis.²⁰¹

It is true that impeachment in England was not limited to public officials. Therefore, if Article II, Section 4, is not a comprehensive statement of the scope of impeachment (and of course I believe it is not), federal impeachment is not limited strictly to civil officers and could in theory, if

201. Amar, *If You Convict*, *supra* note 193, at 20. Amar also suggests that in my view of impeachment the House might impeach the President, and the Senate convict, for vetoing pork-barrel legislation. See *id.* Vikram Amar took up this point as well (although he decorously limits it to a veto of *important* legislation). See Amar, *supra* note 34, at 403, 415 n.19. Another red herring. The same could happen within the Amars' (or anyone's) view of impeachment, of course. If Congress has a brain spike, goes berserk, and disregards the fundamental nature of impeachment as a criminal process, anything is possible. The view of some of my critics that impeachable offenses need not be crimes is actually more accommodating to this farfetched possibility than my theory.

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granted to Congress in its historical scope,²⁰² extend to private persons.

Amar's fears of impeachment and disqualification of private persons by Congress for mendacity, political allegiance, or jaywalking are nonetheless wildly overwrought.²⁰³ This specter is wholly impossible within any remotely correct understanding of impeachment. Amar here willfully misses the central element of impeachment. Impeachment is a common law criminal process, with a body of precedent. It is, as Blackstone put it, the "prosecution of the already known and established law." There is a historical body of impeachable offenses, which do not include jaywalking or anything like it. Amar's concerns about overreaching apply to any common law criminal process, but *less* with impeachment than most others. The habiliments of impeachment, procedural, historical, precedential—as well as the political accountability of the congressional players—fully obviate his fears in this regard, particularly since the worst Congress can do to a private person is to disqualify for future office. With these limitations, impeachment simply is not a practical, or even conceivable, weapon against private persons, except in the most extraordinary or exotic circumstances.²⁰⁴ By 1787 this strand of impeachment had fallen into disuse in England. It has similarly receded from view in the United States.

202. The range of penalties possible in English impeachments *is*, of course, sharply curtailed in Article I, Section 3.

203. If such a thing ever happened, the United States would already have molted into a theocracy or a fascist state. At that point impeachment would be the least of our problems.

204. Suppose a demagogue with a violent political philosophy developed a strong following in a state and controlled the local political machinery. Suppose further that he had committed a serious crime that could not be prosecuted because of his local influence. This is more than a purely abstract possibility. Some readers may recall the career of Leander Perez, an ultra-segregationist political boss in Plaquemines Parish Louisiana in the 1950s and 1960s, who wielded enormous power locally. Although engaged in massive corruption, and suspected of other crimes as well, Perez was beyond the reach of any court where trial would be by jury. I am not holding out, please note, impeachment and disqualification from future federal office as the most recommendable way to deal with a Leander Perez (although some high-minded people might approve it), but it would hardly have threatened the foundation of our system of ordered liberty. Nor—and this is more important to the question at hand—would 18th century lawmakers have thought so. James Bayard, a manager in the 1799 impeachment of William Blount, offered an analogous scenario:

Let us suppose, that a citizen not in office, but possessed of extensive influence, arising from popular arts, from wealth or connexions, actuated by strong ambition, and aspiring to the first place in the Government, should conspire with the disaffected of our own country, or with foreign intriguers, by illegal artifice, corruption, or force, to place himself in the Presidential Chair . . . what punishment would be more likely to quell a spirit of that description, than absolute and perpetual disqualification for any office . . . ?

8 ANNALS OF CONG. 2254 (1799).

The 1787 impeachment of Warren Hastings in Parliament, of which the framers apparently approved, had a similar flavor. Hastings had resigned as Governor-General of the East India Company, but was impeached and tried at the urging of Edmund Burke among others for corrupt and oppressive conduct in India beyond the reach of local law. See HOFFER & HULL, *supra* note 128, at 113-14.

But not totally. Impeachment of private persons is not absolutely alien to American practice. The first federal impeachment, in 1799, was directed at a former U.S. Senator who had already been expelled from the Senate and was therefore a private citizen at the time. The Senate dismissed the impeachment.²⁰⁵ Its action, admittedly, could betoken the view that only a current civil officer is susceptible to trial in the Senate. Also possible, though, is that the Senate simply decided it would not try one of its own whom it had already punished for misconduct. The Belknap impeachment of 1876 reinforces the latter view. Belknap, a Secretary of War, had resigned his office on the day of his impeachment by the House. The Senate decided nonetheless to take jurisdiction and try Belknap, who was eventually acquitted.²⁰⁶ Belknap was, to be sure, a *former* civil officer, but Article II, Section 4, is couched solely in terms of *removal* of current civil officers. If that clause is a comprehensive statement of the scope of impeachment—and removal from office an inherent element of any conviction—the Senate’s action in the Belknap impeachment is impossible. Therefore, the point that Amar advances as though a devastating counterexample against my theory of impeachment turns out to be more damaging to the conventional view.

Like Sunstein, Amar asks why the framers did not explicitly expound this aspect of impeachment. The reason, here also, is much the same. The framers had no particular reason to be concerned with the impeachment of private persons, if it even crossed their minds, because impeachment of that sort was not, and will never be, the main event. In interpreting the constitutional provisions on impeachment, I do not (and do not believe that one can) impute to the framers a specific collective “intent” on impeachment with all the cogs and gears operating in their mind’s eyes, any more than I impute to them an exact day-to-day notion of how the commerce power would work.

There is, furthermore, an unsettling corollary of the conventional view that only civil officers as enumerated in Article II, Section 4, are subject to impeachment. If that is the whole story, then *military* officers cannot be impeached at all, for any crime. That would seem a far more dangerous possibility than Congress’s persecution of jaywalkers, and most certainly “structurally unsound,” to borrow a phrase with which Amar has flayed my theory of impeachment.²⁰⁷ Apparently, however, we

205. See 8 ANNALS OF CONG. 2247-2416 (1799).

206. See PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP (1876).

207. See Amar, *If You Convict*, *supra* note 193, at 20. In his summary of Article II, Section 4 in the same piece Amar elides this question. Amar writes: “Article II does limit Article I, by saying who may be impeached (only officers) and for what (only high crimes).” *Id.* Actually, it is not so. More precisely Article II says “civil officers,” not “officers.” U.S. CONST., art. II, § 4.

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should fret Congress's possible disqualification of jaywalkers from future office, but not its powerlessness to act at all against a general who is corrupt, homicidal, or even treasonous.²⁰⁸

THE SENSE OF IT

The overall scheme of impeachment in the Constitution, based on its language and history, is surprisingly clear considering the variety and confusion of scholarly opinion on the subject. Impeachment lies for a broad range of serious crimes and, when the crime aims at the state, removal from office is mandatory upon conviction. When the crime aims elsewhere, removal is also possible, but not mandatory, and other penalties, such as censure or suspension from office, are available. The requirement of removal upon conviction of "high" crimes against the state reflects the paramount concern of the sovereignty to protect itself. The sovereignty in question—the United States—was brand new in 1787, and still fragile. It is easy to see why the framers took no chances with crimes harming the nation.

Because the range of impeachable crimes is broad, impeachment is entirely sufficient to protect the public against wrongdoing by the President. Direct action by the courts against the President is overkill. There is no need for it, ever.²⁰⁹ Indeed the impeachment provisions make considerably less sense if the President is susceptible to compulsory judicial process in addition to impeachment.

It is, therefore, a fair conclusion that subjecting a sitting President to compulsory judicial process is wrong as a matter of constitutional principle. What the recent imbroglio demonstrates as well is that it is a terrible idea in practice wholly apart from that. The public has no vital interest in having the President subject to compulsory judicial process, and nothing to fear from presidential immunity. In order to carry out an illegal or criminal scheme, a President must near-inevitably act through others

Therefore the limitation on the impeachment power in Article II, Section 4, in Amar's view, puts military officers beyond impeachment.

208. Anticipating the response that Congress can always impeach a President who fails to discipline a wayward general, let me question whether it is "structurally sound" to have to cut off the head of the government when one of the arms goes astray? Some may remember the case of Lieutenant Calley who, after being convicted of direct participation in the My Lai Massacre, was more nearly rewarded than punished by the Nixon administration. Suppose the administration had done nothing at all, or had even promoted Calley? Would impeachment and removal or censure have been more "outlandish" (another of Amar's epithets. See Amar, *Amar Responds to Taylor*, *supra* note 193) than Congress's forced passivity? For additional discussion of impeachment of military officers, see *supra* p. 66.

209. In the conventional view, by contrast, impeachment does not easily reach such crimes as murder and arson. Since the conventional wisdom also has the President immune from indictment—albeit not from other types of judicial action—it leaves the public defenseless, literally, against a President who kills a private person with malice aforethought.

whom the courts can reach.²¹⁰ Should, against all odds, the President decide to rob a 7-Eleven acting strictly alone, impeachment would be more than sufficient pending removal and further prosecution, psychiatric treatment, or both. As for a private lawsuit brought by a plaintiff with an ax to grind, there is no hazard to the republic if the suit is deferred until the President is out of office.

To appreciate fully the incoherence of the prevailing doctrines on these matters, consider that under current law as widely understood the President can be sued in tort, but not indicted, or even impeached in some variants, for murder.²¹¹

Immunity from judicial process does not place the President above the law. The existence and breadth of impeachment, as the participants in the Constitutional Convention understood perfectly, assure that the President is not above the law. What is at issue is who delivers the law to which the President is subject. In the original score, if we follow the tempo markings and phrasing faithfully, it is the Congress, through impeachment, and not the courts, that imposes the law on the President's person.

In fact, through all the public pieties about the President's not being above the law, President Clinton was rather more *below* the law in the Lewinsky affair. No one other than the President of the United States would have suffered such consequences for having told a lie in a deposition, on a matter barely relevant to the subject matter of a case that was in any event dismissed. A lawsuit against the President, however, brings

210. This is the point made by Gouverneur Morris at the Constitutional Convention, who thought originally that even the impeachment power was unnecessary. *See supra* p. 59.

211. Cass Sunstein concludes, correctly I believe, that murder of a private person is not a high crime. *See* Sunstein, *supra* note 2, at 293. Sunstein's analysis of high crimes and misdemeanors is the most coherent and historically accurate of those embracing the conventional reading of Article II, Section 4. Other scholars' handling of the question of murder and other grievous crimes as impeachable offenses is downright tortured. Consider the following statement of Laurence Tribe:

There may well be room to argue that the very continuation in office of a president who has committed a crime as heinous as murder, and who under widely accepted practice is deemed immune to criminal prosecution and incarceration as long as he holds that office, would itself so gravely injure the nation and its government that such a president's decision not to resign under the circumstances amounts to a culpable commission and thus an abuse of power and that, in any event, the fact that such a president's continuation in office was itself gravely injurious to the nation would transform his remaining in office, if not the murder he committed, into an impeachable offense.

Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 227 (1998) (statement of Professor Tribe). If the possibility of being shielded from indictment by presidential immunity makes a serious crime "high," then we are back to a nearly open-ended notion of impeachable offenses where "high" means "serious" in the eye of the beholder. Ask any of President Clinton's opponents and they will tell you that his misconduct met that test in a breeze. For further thoughtful observations on this point, see Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 744-45 (1999).

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out the ghouls. A self-appointed operative made surreptitious recordings of a purported friend and fed them to the plaintiff's camp in the suit. Imagine any other tort suit with so much machinery mobilized to nail a defendant, and going so far outside the subject matter of the suit. By itself this demonstrates beyond peradventure why the President ought not to be subject to routine judicial process in a civil suit.

Another consequence of the President's exposure to the judicial machinery in the Paula Jones case—and here the millennial absurdity of the whole affair is fully revealed—was that it ended up supporting a minimally sufficient impeachment. Perjury and witness-tampering are serious crimes, and hence potentially impeachable, even though the perjury alleged here would be a close call in a prosecution in a regular criminal court.²¹² Because impeachable crimes, however, are not congruent with crimes prosecutable in regular courts—they reflect the largely self-contained jurisprudence of impeachment itself—impeachment could not be ruled out here at the threshold.

And since we had a full-blown impeachment, albeit with a bare minimum legal basis, the reader may indeed wonder what difference it makes whether the President is subject to impeachment only or to judicial proceedings as well as impeachment. What difference does it make, in other words, whether the investigatory stage in cases of presidential misconduct unfolds in the courts or solely through the arm of Congress? But the Lewinsky affair in fact underscores the enormous difference between the two regimes. The impeachment leg of the proceedings was itself wholly contingent on prior judicial proceedings against the President. Without the initial action against the President in the Paula Jones lawsuit, there would have been nothing to which an impeachment could possibly have attached.

The wrongdoing here, and the ensuing impeachment, was simply an outgrowth of exposing a President to compulsory judicial process, which the very existence and scope of impeachment render unnecessary in the first place.

What is perverse about the impeachment of President Clinton is the idiotic premise on which it rested. The President was not forced to respond to judicial process in the Paula Jones sexual harassment suit because he committed a crime of paramount public concern. That case, remember, was dismissed as meritless. Rather, the President was charged with wrongdoing in impeachment because of having had to face compul-

212. In his grand jury testimony, President Clinton did not explicitly reassert his earlier deposition testimony from the Paula Jones lawsuit, but purportedly proffered a "false and misleading" characterization of the earlier testimony. That cuts it pretty fine.

sory legal process in the Jones case. The misconduct at issue here—following up a false deposition in the Paula Jones case with falsehood before the grand jury—had no independent significance. It was itself merely a byproduct of judicial process directed at the President, essentially of a sting set up in the courts. What we had here, in short, was an iatrogenic impeachment.²¹³

Compare this with the Watergate affair, where President Nixon was found to have obstructed justice in the investigation of serious crimes committed while he was in office, those crimes being independent of the proceedings that Nixon had sought to subvert.

It is illuminating, in fact, to replay Watergate and the recent misadventure in an imaginary world where the President is not subject to judicial process.

The Watergate affair comes out much the same. In that event, impeachment would have been—indeed was—entirely sufficient to the end of public protection. With or without court orders directed against President Nixon, there was ample subject matter for impeachment, ample evidence, and ample opportunity for Congress to develop that evidence by compulsory process of its own.²¹⁴

By contrast, in the recent affair, where as far as I can tell nothing of public consequence occurred,²¹⁵ impeachment would never have gotten

213. The reader doubtless knows what that is, but just in case, an “iatrogenic” disease is a disease itself caused by medical treatment, as when you enter a hospital for tests and contract a staphylococcus infection that you would not otherwise have suffered.

Readers of an earlier draft of this paper suggested that I was trying to defend President Clinton on the ground that he was entrapped. Not at all. President Clinton was *not* entrapped. He was, however, set up—enTripped, if you will. My point here is not to exonerate President Clinton, but to stress how perversely mistaken it was to let private litigants loose against a sitting President.

In public comments about the impeachment Senator Tom Harkin of Iowa quoted the above line about a “sting set up in the courts” to describe the machinations of the Office of Independent Counsel and Jones’ attorneys. See Tom Harkin, *Iowa’s Senators Explain Their Opposing Votes*, DES MOINES REGISTER, Feb. 13, 1999, at 11. My point here, actually, is somewhat different: that the Supreme Court’s decision in *Clinton v. Jones* exposed President Clinton to being set up by maneuvers of purely private litigants.

214. Congress can assert its own demands for information in connection with impeachment proceedings and act accordingly if the President does not cooperate. Given that impeachment is inherently a criminal proceeding, the tribunal (the Senate) can certainly take into account a President’s evasion or refusal to supply evidence. Indeed, refusal to provide relevant evidence likely constitutes in itself a valid separate count of impeachment.

The Independent Counsel statute expressly reserves to Congress the full range of investigatory powers in impeachments:

An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment. Nothing in this chapter or Section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

28 U.S.C. § 595(c) (1994).

215. The Whitewater side of the special counsel’s investigation turned up nothing solid

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off the ground. Indeed, there would have been no public event at all, because Paula Jones' lawsuit, if held off until Clinton were out of office, would have attracted no attention in Congress.²¹⁶

I can therefore say with some confidence that a regime of presidential immunity, coupled with the impeachment power viewed in its true light, would have brought a harmonious resolution to both of these notorious episodes.²¹⁷

One often hears that impeachments are particularly vulnerable to the vagaries of political passion. An implied or express corollary is that judicial proceedings are not. Do not believe it. A lawsuit starts at the caprice—or rapacity—of a plaintiff. Once under way it is an infernal machine that for much of its course is nearly impossible to stop. Compulsory legal process can be mobilized without any degree of consensus. That makes it, when directed at the President, a ready-made apparatus for political actors and ideologues of all stripes.²¹⁸ Recall how easily political opponents of President Clinton were able to hijack the judicial proceedings in which he was involved.

Impeachment, for its part, cannot get started without a substantial degree of consensus. In this instance, the momentum for impeachment was supplied by earlier proceedings in court. Because the congressional actors in an impeachment are answerable to the public—which in this event had little stomach for impeachment—it is hard to see how there could have been an impeachment here, had it not been delivered to Congress ready-made from another place.

When the dust settled, the House of Representatives found—or, more accurately, had received as a windfall—enough to impeach. And although the President's supporters run the gamut from apoplectic to apocalyptic on the matter, the House's action is far from self-evidently wrong. Once the decision on impeachment was squarely before the House, there was no fully satisfactory outcome. The Republicans in the House doubtless acted opportunistically. Opportunity was served up to them, however, by the Supreme Court, the Independent Counsel statute, and President Clin-

against the President.

216. And since the *raison d'être* of the Jones lawsuit was to hurt the President politically, it might well not even have been pursued after Clinton left office.

217. In either of these two imaginary worlds, it goes without saying, a prosecutor could mobilize judicial process against all persons involved in wrongdoing other than the President. In Watergate, that would have been more than sufficient as a predicate of impeachment. Many have forgotten that by the time the Supreme Court's order in *United States v. Nixon* was issued, articles of impeachment had *already* been voted by the House Judiciary Committee.

218. In *Clinton v. Jones*, the Supreme Court suggested that "the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment." 520 U.S. at 708, 709. Really? How much will sanctions deter a judgment-proof ideologue?

ton himself. Short of being saintly, the congressional Republicans were bound to snap at a bone so tempting as perjury by the President in a federal judicial proceeding. Imagine a prosecutor or a District Attorney who gets evidence that the mayor of the city—who is from the opposing political party—has committed a crime. This D.A. will seek to indict—it is Pavlovian—even if the public overwhelmingly favors the mayor.²¹⁹ Nor will, or should, the D.A. hold back simply because the crime results from a forced encounter of the mayor with the least dangerous branch.

President Clinton's supporters apparently still cannot bring themselves to take the Supreme Court to task for setting the stage of this tragicomedy. The Court, though, did exactly what critics impute to the House of Representatives in this matter: resolve a question of power in favor of having more. One might expect the Supreme Court to have a clearer notion of the reasonable (and legitimate) bounds of its power than the House of Representatives. There should have been no Paula Jones lawsuit.²²⁰ But there was, and we then had—legitimately—an impeachment based on a foot fault.²²¹ For a conscientious Senator there was no self-evident course in the trial. The nature of impeachment, while it did not invite conviction, did not exclude it either. Given the possibilities in play, acquittal was, I think, the best outcome. Another tolerable course would have been for proceedings in the Senate to have been resolved short of trial with some kind of censure of the President, as discussed above,²²² but that idea never surfaced on the Senate's radar.²²³

Statutory Immunity for the President

What can be drawn from this fiasco is a lesson for the future: Do not set up the President to get entangled in proceedings in court. Consider the odds. The cost to those players who may have to wait until the President is out of office to make their move is likely to be far smaller, on balance, than the cost to the entire country in the obverse situation where the President gets stupidly enmeshed in legal proceedings. Particularly weighty in framing these odds is the scope and flexibility of impeachment

219. A current refrain is that the recent proceedings were more intensely "partisan" than the Watergate proceedings of hallowed memory. This is largely myth. In the House Judiciary Committee vote on articles of impeachment in 1974, not a single Democrat voted against impeachment. There were, to be sure, Republican votes *for* impeachment in the Committee, but all the Republicans who voted for impeachment in the Committee were from the moderate/centrist wing of the party. The division along ideological lines was as sharp then as now.

220. Not while the President was in office, that is.

221. The President, thanks to the courts, was in a minefield at the time of making it.

222. See *supra* pp. 86-88.

223. Except perhaps in the barely recognizable form of the eleventh-hour proposal of "findings of fact." See *supra* pp. 89-90.

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as an arm against presidential misconduct. Various suggestions that have surfaced in the accommodationist vein—acknowledging, for example, that the President is beyond direct judicial command in civil but not criminal actions—have no evident constitutional footing. The Supreme Court could come up with no grounded line of demarcation, natural or otherwise, between *United States v. Nixon* and *Clinton v. Jones*.²²⁴ A change in this regime, I suspect, must come from Congress or not at all.

It is hard to miss the palpable irony running through the whole affair. President Clinton's supporters included many from the cheering section for *United States v. Nixon* in 1974. That the instrument for delivering the *coup de grâce* against President Nixon molted into a land mine on which their champion Tripped left a number of them shell-shocked. Still, the American legal academy is so judiciocentric that this nightmarish turn of events has not yet elicited, in print at least, second thoughts about *United States v. Nixon* from its early fans.

Pending an epiphany that brings the courts to reconsider the entire question of presidential immunity, or a regime of statutory immunity for the President as outlined below, practical advice for future presidents is to master the finer points of Rule 37(b) of the Federal Rules of Civil Procedure.²²⁵ Better to pay off litigants with money, if the courts are bent on

224. Note in this regard the Court's pronouncement in *Clinton v. Jones* that "if [the federal judiciary] may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct." *Clinton*, 520 U.S. at 705.

225. What President Clinton could have done, which would have been both honorable and legally skillful, is to refuse to answer questions about his recent sex life and accept the consequences under Rule 37(b) of the Federal Rules of Civil Procedure, which provides sanctions for failure to answer questions in a deposition. In a lawsuit ultimately dismissed as meritless on summary judgment, any sanction under Rule 37(b)(2) could hardly have been substantial. Better yet, President Clinton could have refused to be deposed at all, again accepting the consequences under Rule 37(b), thereby refusing to acquiesce in the extension of judicial power implied by *Clinton v. Jones*. In an ensuing showdown with the courts and Congress—not a likelihood in any event—President Clinton, who could more than plausibly have assumed the mantle of Defender of the Presidency, would, I think, have had broad public support.

In a further irony, President Clinton did in the end suffer penalties under Rule 37(b). And these were more severe than those he would have borne had he refused the deposition from the start. The district judge in the Paula Jones case eventually cited President Clinton in contempt for the false deposition and imposed a penalty of \$90,000 under Rule 37. This contempt award took into account the additional expense borne by the plaintiff's side, in attorney's fees and the like, as a consequence of the President's false testimony. A refusal to answer irrelevant personal questions, or even to be deposed at all, could only have entailed by this standard a *smaller* penalty under Rule 37, because there would have been no additional costs, but rather lower costs. Given that the suit was dismissed on summary judgment without regard for the content of the President's deposition, the penalty awarded under Rule 37 necessary to compensate the plaintiff, even resolving every controverted fact against the President, would in fact be, more or less, zero.

It was also suggested that President Clinton ought simply to have defaulted in the Paula Jones suit. See *Interright* (MSNBC television broadcast, Nov. 10, 1998) (remark of Alan Der-showitz). That would be perfectly all right as an ethical matter in my view, but after a default a defendant automatically loses on the merits and owes the full amount claimed. In that event, suing the President would become a national pastime for plaintiffs' lawyers everywhere. Sanctions under Rule 37(b), by contrast, are more closely tied to the merits of the case. If the case is re-

letting them loose against presidents, than to let them stake out a mortgage on the nation.

And although one might hope that the late events would lead the Supreme Court to reconsider the President's exposure to judicial process, that would be an unexpected turn. The Court's flat assertion in *Clinton v. Jones* that the President is "subject to the laws for his purely private acts"²²⁶ leaves scant room for artful distinction. A President faced with the problem would not want to take a chance, in any event, given the unfolding of the recent affair.

Therefore, when the passions of the day have cooled, it would be a capital idea for Congress to confer on the President, by statute, a substantial measure of personal immunity from judicial process while in office. At a minimum, the President's exposure to any and all civil actions should be eliminated until the end of term. Immunity from orders to appear or testify in *any* proceeding would also be desirable, to my mind, although the trade-off between public protection and the President's exercise of power is admittedly different in that situation.²²⁷

The Broader Canvas

Having exhausted technical arguments, let me add in further support of the essential soundness of the understanding of impeachment that I have expounded here what might be considered the practical wisdom of impeachment. By this I mean that the actions of the players in impeachments have tended to some extent to drift into line with the true regime of impeachment, even though ostensibly they operate under a different view. During the Watergate affair, for example, Article II, Section 4, was generally taken as an exhaustive definition of impeachable offenses, but there was little focus on the historical meaning of "high crimes and misdemeanors" as terms of art. Rather, "high crimes and misdemeanors" were viewed as a generic rubric of impeachable offenses, open-ended in content and not necessarily limited to crimes.²²⁸ In effect, the full historical range of impeachable offenses (and maybe more) was packed into Ar-

solved on the pleadings or summary judgment (making the content of any disputed deposition irrelevant), sanctions fall out of the picture as well.

226. *Clinton*, 520 U.S. at 696.

227. The exigencies of a legitimate prosecution of some third person, as in Watergate or Iran-Contra, I must concede, are less subject to politically motivated maneuver than a lion-hunter's private lawsuit.

228. This was the view of Raoul Berger, among others, and informed the deliberations of the House Judiciary Committee in 1974. A staffer of the House Judiciary Committee passed through Yale Law School (where I was a student) at the time. In conversation I referred to impeachment as a "criminal" proceeding. The staffer responded to me that the use of the word "criminal" in close proximity to the word "impeachment" was proscribed among the Committee staff, to avoid the slightest implication that impeachable offenses might be limited to crimes.

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ticle II, Section 4. As a result, the imprecise focus of the players on the meaning of Article II, Section 4, was cancelled out, more or less, by an expansive view of high crimes and misdemeanors.

In connection with today's affair, a few academic commentators have rediscovered more precisely the import of "high" crimes against the state and urged this view in defense of the President. This academic change of heart had little sway in the House of Representatives, however, which went ahead and impeached anyway, operating more or less within the same notion of impeachable offenses that informed the events of 1974.²²⁹ At the same time, though, the idea of censure as a congressional response to lesser misconduct—which barely surfaced in 1974—sprang up repeatedly during the proceedings. And this despite the initial academic consensus that censure is entirely alien to the impeachment process. These developments betoken considerable straining against the conventional wisdom on impeachment to arrive at something more sensible.

In closing, I want to bring attention back to the fundamental problem in these events. It seems to many that something went seriously wrong here. Not a few are inclined to blame the Republican majority in Congress for having mobilized the machinery of impeachment against wrongdoing in which the public has no paramount concern.²³⁰ The House of Representatives' hair trigger stands in apparent contrast with Congress's more restrained pursuit of impeachment in the past. But this affair jumped the tracks long before it reached Congress, and the House's action *is* within the legitimate, though not sagacious, uses of impeachment. The real vice here was the combination of a civil action and elaborate prosecutorial machinery directed at the President. When these events are

229. The new-found rigorist interpretation of high crimes and misdemeanors, for its part, fits uneasily with the prevailing broad-gauged reading of Article II, Section 4, as a comprehensive definition of impeachable offenses. If one must accept that "shall be removed" in Article II, Section 4, is just an imprecisely worded way of ushering in a definition of impeachable offenses, then it is unreasonable to adopt a rigorist, narrowly technical reading of "high crimes and misdemeanors." Within this somewhat looser understanding of Article II, Section 4, "high crimes and misdemeanors" are better viewed as a generic rubric for impeachable offenses. If the numerous pronouncements on impeachable offenses from 1787-1789, some of which are discussed above, are taken to reflect the framers' and others' understanding of "high crimes and misdemeanors," then the latter are indeed vastly broader than their meaning in the English common law.

230. Much contumely was also heaped on Kenneth Starr, who deserved little of it. Most of what Starr did was either squarely within his statutory mandate or a normal part of a prosecutor's work. Professor Ackerman took Starr to task for sending a report to Congress on Clinton's conduct without specifying whether or how it constituted high crimes and misdemeanors. See Ackerman, *supra* note 35, at A33. But that was not Starr's job in this instance. In relation to the impeachment, Starr was not even a prosecutor. The House, as many constitutional scholars know, is the prosecutor in impeachment. Starr was following a statutory instruction to report possible impeachable offenses to Congress. See *supra* note 24. This was a case of "Just the facts, ma'am." There was no reason for Starr to superimpose his view of impeachable offenses on those facts. It is for Congress, in its accusatory and adjudicative roles, to determine the nature of impeachable offenses.

viewed from a more detached perspective, it will become apparent to others besides me, I think, that Congress throughout took a more sensible view of impeachment, on balance, than the Supreme Court took of the President's exposure to judicial process.

CONCLUSION

The point of this excursion into the original meaning of impeachment in the Constitution is twofold. First, the impeachment provisions correctly understood in their textual and historical setting are more sensible than the view of impeachment embodied in today's academic consensus. Second, in light of the scope of impeachment, the case for the President's entire immunity from judicial process is compelling, if not overwhelming. The academic mainstream takes too narrow a view of impeachment and too expansive a view of the President's exposure to judicial power. There is some canceling out, but the correct balance is by no means restored. Under the true regime, the dismal proceedings concerning President Clinton's misconduct would not have been. To be sure, there would also have been no impeachment and no trial in the Senate if the House had set the bar of impeachment very high, at narrowly defined "high crimes and misdemeanors." But restraint on Congress, once impeachment has momentum, is largely and inevitably hortatory. And on the other side of the scales, if you set the bar of impeachment that high, what do you do about the most grievous crimes that are not "high"? More than likely your doctrine breaks down or veers off into casuistry. This explains the amoeba-like quality of "high crimes and misdemeanors" among many holders of the conventional view.

As the sole lever of public action against a sitting President, impeachment in its true form discriminates perfectly well between misconduct of paramount public concern and matters less urgent. The command of Article II, Section 4, to remove civil officers guilty of treason, bribery, or other high crimes and misdemeanors, protects the sovereignty from vital harm while leaving Congress discretion to deal with other serious wrongs.

The unfolding of the Lewinsky affair was not, as some have contended, a pathology of impeachment. The House of Representatives did not suddenly become an accusatory pit bull after two centuries of decorous restraint. Rather, a ready-made impeachment was delivered to the House in the bizarre aftermath of a marginal civil action against the President.

The conclusion that begs to be drawn here is that something went badly astray in the relation between the President and the courts. The correct understanding of impeachment underscores that the exposure of

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the President to compulsory judicial process is mischievous, and thoroughly redundant for all but civil litigants who might have to wait (at most 8 years) for their shot at suing the President.²³¹ That is a small sacrifice to ward off misadventures of the sort we suffered of late.

231. To preserve claims against the President, statutes of limitations could be tolled during a President's tenure of office. To offset the cost of deferral of claims, successful litigants could be awarded up to eight years of pre-judgment interest.

